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Supreme Court of the United States

October Term, 1979

No. 79-2060

In re BEEF INDUSTRY ANTITRUST LITIGATION
M.D.L. DOCKET No. 248

A. L. BLACK, *et al.*,

Petitioners,

vs.

ALBERTSON'S INC., *et al.*,

Respondents.

APPENDICES TO THE PETITION FOR A WRIT OF CERTIORARI

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APPENDIX

In re BEEF INDUSTRY ANTITRUST LITIGATION,
M.D.L. DOCKET
No. 248.

PONY CREEK CATTLE CO., INC., et al.,
Plaintiffs-Appellants,

MUSSELMAN RANCH CO., etc., et al.,
Plaintiffs-Internevors-Appellants,
vs.
THE GREAT ATLANTIC & PACIFIC TEA CO. et al.,
Defendants-Appellees.

R. DIRK AGEE et al.,
Plaintiffs-Appellants,
vs.
SAFEWAY STORES, INC., et al.,
Defendants-Appellees.

MEAT PRICE INVESTIGATORS
ASSOCIATION, etc., et al.,
Plaintiffs-Appellants,
vs.
SAFEWAY STORES, INC., et al.,
Defendants-Appellees.

RICHARD S. LOWE et al.,
Plaintiffs-Appellants,
vs.
SAFEWAY STORES, INC., et al.,
Defendants-Appellees.

A. L. BLACK, et al.,
Plaintiffs-Appellants.

vs.

ALBERTSON'S, INC., et al.,
Defendants-Appellees (two cases).

CHAPARRAL CATTLE CORP., et al.,
Plaintiffs-Appellants,

vs.

SAFEWAY STORES, INC., et al.,
Defendants-Appellees.

BURKE PETERSEN et al.,
Plaintiffs-Appellants,

vs.

SAFEWAY STORES, INC., et al.,
Defendants-Appellees.

RONALD BECKER et al., on behalf of
themselves and all other persons
similarly situated,
Plaintiffs-Appellants,

vs.

SAFEWAY STORES, INC., et al.,
Defendants-Appellees.

JOHN O. VARIAN et al.,
Plaintiffs-Appellants,

vs.

SAFEWAY STORES, INC., et al.,
Defendants-Appellees.

MEAT PRICE INVESTIGATORS ASSOCIATION et al.,
Plaintiffs-Appellants,
vs.
SAFEWAY STORES, INC., etc., et al.,
Defendants-Appellees.

LITTLE RANCH CO., INC., et al.,
Plaintiffs-Appellants,
vs.
THE NATIONAL ASSOCIATION OF FOOD CHAINS, etc., et al.,
Defendants-Appellees.

RONALD BECKER, et al., on behalf of themselves and all other persons similarly situated,
Plaintiffs-Appellants,
vs.
SAFEWAY STORES, INC., etc., et al.,
Defendants-Appellees.

Nos. 78-1817—78-1829.
UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT
Aug. 17, 1979

Cattlemen, ranchers and feeders brought private actions against 25 retail food chains, a wholesale grocer, the retail chains' national trade association and a beef industry price reporting publication alleging violations of federal antitrust laws. The United States District Court for the Northern District of Texas, William M. Taylor, Jr., J., dismissed the actions with prejudice for failure to state claims upon which relief can be granted. On appeal, the Court of Appeals, Wisdom, Circuit Judge, held that: (1) claims for damages were within

ambit of rule of *Illinois Brick* barring damages actions against alleged price fixers by indirect purchasers; (2) complaints stated claims for damages within "cost-plus" exception to *Illinois Brick* bar; (3) *Illinois Brick* bar had no application to claims for injunctive relief; (4) complaints alleging retail price fixing which also alleged that some of plaintiffs had purchased beef as consumers at prices affected by alleged conspiracy stated sufficient injury to one's "property" within meaning of Clayton Act; and (5) genuine issues of fact existed as to when plaintiffs had actual or constructive knowledge of their cause of action, precluding partial summary judgment on their claim that defendants' fraudulent concealment of alleged conspiracy tolled four-year statute of limitations of Clayton Act.

Reversed and remanded.

1. Monopolies — 28(1.6)

Rule of *Illinois Brick* barring damages actions against alleged price fixers by indirect purchasers applied to suits brought by cattlemen, ranchers and feeders against retail food chains, wholesale grocer, retail chains' national trade association and beef industry price reporting publication seeking relief for violations of Sherman Act. Sherman Anti-Trust Act, § 2, 15 U.S.C.A. § 2.

2. Monopolies — 28(1.6)

There is nothing special about monopsony or oligopsony price-fixing cases that justifies treating them differently from monopoly price-fixing cases for passing-on purposes and application of rule of *Illinois Brick* barring damages actions against alleged price fixers by indirect purchasers. Sherman Anti-Trust Act, §§ 1, 2, 15 U.S.C.A. §§ , 2; Clayton Act, §§ 4, 16, 15 U.S.C.A. § 15, 26.

3. Monopolies — 28(1.7)

In actions by cattlemen, ranchers and feeders against retail food chain, wholesale grocer, retail chains' national trade association and beef industry price reporting publication involving alleged violations of federal antitrust laws, rule of *Illinois Brick* barring damages actions against alleged price fixers by indirect purchases applied to complaints against trade publication and trade association even though they did not buy or sell beef at all and there were no firms in beef marketing system that dealt directly with them. Sherman Anti-Trust Act, §§ 1, 2, 15 U.S.C.A. §§ 1, 2; Clayton Act, §§ 4, 16, 15 U.S.C.A. §§ 15, 26.

4. Monopolies — 28(6.1)

In actions by cattlemen, ranchers and feeders against retail food chains, wholesale grocer, retail chains' national trade association and beef industry price reporting publication involving alleged violations of federal antitrust laws, district court did not abuse its discretion in failing to give plaintiffs opportunity to amend their complaints, after *Illinois Brick* decision barring damages actions against alleged price fixers by indirect purchasers, to allege a vertical conspiracy, and by denying postjudgment requests for leave to amend. Sherman Anti-Trust Act, §§ 1, 2, 15 U.S.C.A. §§ 1, 2; Clayton Act, §§ 4, 16, 15 U.S.C.A. §§ 15, 26.

5. Federal Civil Procedure — 833

Leave to amend pleadings should be granted liberally when previously unimportant factual issues gain significance as result of rulings on a point of law handed down during pendency of litigation.

6. Monopolies — 28(6.2)

In actions by cattlemen, ranchers and feeders against retail food chains, wholesale grocer, retail chains' retail trade asso-

ciation and beef industry price reporting publication involving alleged violations of federal antitrust laws, complaint stated cause of action within "cost-plus" exception to rule of *Illinois Brick* barring damages actions against alleged price fixers by indirect purchasers. Sherman Anti-Trust Act, §§ 1, 2, 15 U.S.C.A. §§ 1, 2; Clayton Act, §§ 4, 16, 15 U.S.C.A. §§ 15, 26.

7. Monopolies — 28(1.6)

One who deals with a nonconspiring competitor of price fixing firms has standing to sue those firms for treble damages. Sherman Anti-Trust Act, §§ 1, 2, 15 U.S.C.A. §§ 1, 2; Clayton Act, §§ 4, 16, 15 U.S.C.A. §§ 15, 26.

8. Monopolies — 24(7)

Rule of *Illinois Brick* barring damages actions against alleged price fixers by indirect purchasers has no application to claims for injunctive relief. Clayton Act, § 16, 15 U.S.C.A. § 26.

9. Monopolies — 28(6.7)

In actions by cattlemen, ranchers and feeders against retail food chains, wholesale grocer, retail chains' national trade association and beef industry price reporting publication involving alleged violations of federal antitrust laws, complaints of retail price fixing which also alleged that some of plaintiffs had purchased beef as consumers at prices affected by alleged conspiracy sufficiently alleged an injury to one's "property" within meaning of Clayton Act. Clayton Act, § 4, 15 U.S.C.A. § 15.

10. Monopolies — 28(1.6)

Only those within "target area" of alleged antitrust conspiracy have standing to sue. Clayton Act, § 4, 15 U.S.C.A. § 15.

11. Federal Civil Procedure — 103

Question of standing is a preliminary one, to be answered from examination of allegations of complaint.

12. Federal Civil Procedure — 650

Although unnecessary evidentiary details are usually not stricken from complaint unless prejudicial or of no consequence to controversy, evidence pleading, as distinguished from pleading of ultimate facts, is not favored under federal rules. Fed.Rules Civ.Proc. rule 8(a), 28 U.S.C.A.

13. Federal Courts — 817

District court's action in striking material from complaint will not be disturbed unless it was an abuse of discretion. Fed. Rules Civ.Proc. rule 8(a), 28 U.S.C.A.

14. Federal Civil Procedure — 1124

In actions by cattlemen, ranchers and feeders against retail food chains, wholesale grocer, retail chains' national trade association and beef industry price reporting publication involving alleged violations of federal antitrust laws, district court did not abuse its discretion in striking evidentiary details concerning alleged retail price-fixing conspiracy from complaint even if such allegations were relevant to claims of price fixing at wholesale level. Fed.Rules Civ.Proc. rule 8(a), 28 U.S.C.A.

15. Federal Civil Procedure — 2011

District court's order striking pleadings does not control issues of materiality and relevancy that govern admissibility of evidence. Fed.Rules Civ.Proc. rule 8(a), 28 U.S.C.A.

16. Limitation of Actions — 104(1)

Fraudulent concealment tolls Clayton Act's statute of limitations. Clayton Act, § 4B, 15 U.S.C.A. § 15b.

17. Limitation of Actions — 104(1)

To avail himself of fraudulent concealment tolling doctrine of Clayton Act's statute of limitations, antitrust plaintiff must show that defendant concealed conduct complained of, and that he failed, despite exercise of due diligence on his part, to discover facts that form basis of his claim. Clayton Act, § 4B, 15 U.S.C.A. § 15b.

18. Federal Civil Procedure — 2557

In action by cattlemen, ranchers and feeders against retail food chains, wholesale grocer, retail chains' national trade association and beef industry price reporting publication involving alleged violations of federal antitrust laws, genuine issue of fact existed as to when plaintiffs had actual or constructive knowledge of their cause of action, precluding partial summary judgment on their claim that defendants' fraudulent concealment of alleged conspiracy tolled four-year statute of limitations of Clayton Act. Clayton Act, § 4B, 15 U.S.C.A. § 15b.

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Appeals from the United States District Court for the Northern District of Texas.

Before WISDOM, HILL, and FAY, Circuit Judges.

WISDOM, Circuit Judge:

These consolidated appeals involve the applicability of *Illinois Brick Co. v. Illinois*, 1977, 431 U.S. 720, 97 S.Ct. 2061, 52 L.Ed.2d 707, to sales by primary producers to middlemen at prices allegedly depressed by price-fixing at the retail level of distribution. The appeals also present other difficult questions concerning federal antitrust laws.

These appeals arise from thirteen private antitrust actions alleging that the concerted activities of the defendants violate the provisions of §§ 1 and 2 of the Sherman Antitrust Act,

15 U.S.C. §§ 1 and 2. The complaints ask for treble damages and for injunctive relief under §§ 4 and 16 of the Clayton Act, 15 U.S.C. 15 and 26. The plaintiffs are cattlemen, ranchers and feeders. The defendants are twenty-five retail food chains, a wholesale grocer, the retail chains' national trade association, and a beef industry price reporting publication.[1] The plaintiffs in the various suits charge that the retail chains combined, primarily by using the trade association and the price reporting publication, to fix at artificially low levels the prices at which beef is purchased from slaughterhouses and meat packers, and ultimately from the producers—cattle ranchers and feeders. The resulting depression in wholesale prices to retailers, passed up the chain of distribution, reduced the prices which the plaintiffs received in selling their cattle to the packers and slaughterhouses.

The Judicial panel on Multidistrict Litigation assigned the cases to the District Court for the Northern District of Texas, for coordinated or consolidated pretrial proceedings. *In re Beef Industry Antitrust Litigation*, 419 F.Supp. 720 (Jud. Pan.Mult.Lit., 1976). In June 1977 the Supreme Court handed down its decision in *Illinois Brick*, holding that a purchaser could not maintain an antitrust damage action against a seller remote from him in the chain of distribution; rejecting, the

[1] The lawsuits involved in this appeal are: *Petersen et al. v. Safeway Stores, Inc., et al.*; *Pony Creek Cattle Co., et al. v. The Great Atlantic & Pacific Tea Co., et al.*; *Lowe, et al v. Safeway Stores, Inc., et al.*; *Meat Price Investigators Ass'n et al. v. Safeway Stores, Inc., et al.*; *Shoshone Tribe of Duckwater, et al. (formerly styled Agee, et al.) v. Safeway Stores, Inc., et al*; *Black, et al. v. Acme Markets, Inc., et al.*; *Chapparal Cattle Corp., et al. v. Safeway Stores, Inc., et al.*; *Becker, et al. v. Safeway Stores, Inc., et al*; *Varian, et al. v. Safeway Stores, Inc., et al.*; and *Little Ranch Co., et al. v. The National Association of Food Chains, et al.*

narrow exceptions, the offensive use of "passing-on".[2] Shortly thereafter the defendants moved for dismissal of the complaints on the ground that the plaintiffs' theory of damages (sellers suing remote purchasers) was a "pass-on" theory indistinguishable in all important respects from the theory of damages (purchasers suing remote sellers) at issue in *Illinois Brick*. The district court agreed with the defendants and dismissed the complaints with prejudice for failure to state claims upon which relief could be granted. The court did not file an opinion, but stated from the bench that the dismissal was based on *Illinois Brick*.

The main issue is whether the complaints should have been dismissed on the strength of *Illinois Brick*. The plaintiffs/appellants also urge that the district court erred in striking from the complaints allegations of retail price-fixing. The plaintiffs in *Pony Creek Cattle Co., Inc., et al. v. The Great Atlantic & Pacific Tea Co., et al.* appeal partial summary judgments granted against them on their allegation that the statute of limitations was tolled because the defendants fraudulently concealed the alleged conspiracy. We agree with the defendants-appellees that the claims for damages, as pleaded, are within the ambit of the rule of *Illinois Brick*. Nevertheless we reverse and remand in all thirteen cases because the complaints state claims for damages within the "cost-plus" exception to the *Illinois Brick* bar. We reverse the partial summary judgments entered on the issue of fraudulent concealment in

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[2] "Passing-on" usually means the process whereby a middleman in the chain of distribution who has been overcharged by a manufacturer or by a producer adjusts his prices upward in sales to a lower level in the chain to reflect the overcharge. This case presents the converse of that situation. Here the passing-on was the result of alleged depressed prices fixed by retailers and imposed upon the middlemen (slaughterhouses and packers). In turn, the middlemen passed-on the undercharge, the depression in prices, to the primary producers (cattle ranchers and feeders).

Pony Creek. In the *Agee* and *Varian* cases, we reverse the district court's order striking the allegations of retail price-fixing. In addition, we hold that the complaints in all the cases state claims for injunctive relief under section 16 of the Clayton Act.

I

These actions were dismissed on the pleadings. The allegations of the complaints therefore are taken as true for purposes of these appeals.

The plaintiffs are all cattle ranchers or feeders or both. Cattle are bred and raised on farms, ranches, and commercial feedlots. The animals are fattened for slaughter by feeding them a concentrated ration for fast growth. Ranchers either fatten the cattle themselves or sell to or place the livestock with feeders for fattening. Most fat cattle, say the plaintiffs-appellants, are purchased by slaughterhouses and packers directly from the ranchers and feedlots, although some are purchased by the slaughterers through auction markets. The cattle are then slaughtered and most of the beef is sold as either boxed or carcass beef to retail and wholesale grocers. The large retail food chains buy most of their beef directly from slaughterers and packers. The complaints do not allege a conspiracy between the slaughterers and packers and the defendants.

The plaintiffs allege that the wholesale or carcass price of beef, the price paid by the retail chains to packers and slaughterers, is established by the large retail chains acting in concert. For any given week, it is alleged, the wholesale price in a given area of the United States is set by the pricing decision of the A & P or Safeway Stores, Inc. or the Kroger Co. or one of the other defendants. In antitrust jargon, each wields monopsony power in its region or, with others, oligopsony

power.[3] One designated retail chain in a given area will buy its beef in the regional wholesale market early in the week. The pricing decisions of the leading purchasers in the various regions of the nation are reported in the National Provisioner, Daily Market and News Service, ("National Provisioner") or "Yellow Sheet", and thus become known to the entire wholesale beef trade. The other retail chains, it is alleged, then follow the price established by the regional leader in purchasing their requirements of beef for the period. The chains, according to the complaints, can dictate the wholesale price to the packers because they wield monopsony or oligopsony power and because the packers have no long-term storage facilities and therefore cannot withhold their product.[4] The chains' power is augmented by their considerable cold-storage capacity: they can blunt price rallies by abstaining from the wholesale market and working from their stockpiles.

The price depressions thus engineered are directly "passed on" to the ranchers and feeders, according to the complaints. The plaintiffs allege that the cattlemen, like the slaughterers and packers *vis-a-vis* the chains, are in no position to negotiate prices because they cannot, at least in the short term, withhold their product. A fattened steer or heifer, the complaints allege, must be sold within three weeks of the time it reaches choice grade. If the animal is not sold in that time it becomes over-fattened and hence less valuable. The supply of fat cattle is therefore inelastic in the short term. The cattlemen contend

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[3] We use the term "monopoly" to refer to price-fixing by sellers; "monopsony" and "oligopsony" to refer respectively, to price-fixing by a single purchaser or by a group of purchasers, that is, the retailers/defendants in this case.

[4] Chainwide pricing decisions for a given region are made possible, according to the allegations of the complaints, by the chain's centralized buying practices. Purchases are made for an entire chain or for a large part of a chain, it is alleged, from a central location.

that they must take the price the packers quote. The packers according to the complaints, bid prices derived directly from the Yellow Sheet (or, west of the Rockies, the Safeway) carcass price. Working from estimates of the percentage of an animal that will be carcass beef salable to the retail chains, the packers pay cattle prices based on the Yellow Sheet prices.[5] Thus, the allegedly artificially low wholesale prices established by the retail chains' combination translate directly into artificially low prices for fat cattle.

The plaintiffs do not know when this alleged conspiracy began, but contend that it has been in operation since 1963 at the latest. The food chain defendants, according to the complaints, coordinate their efforts through meetings conducted by the National Association of Food Chains. The conspirators allegedly effect their price-fixing schemes by allocating to dominant chains geographical areas in which to exercise price leadership, and by controlling or manipulating the "Yellow Sheet". The elimination of price competition is further assured by alleged agreements concerning the conspirators' respective specifications for beef. The plaintiffs charge that the chains in any given region coordinate their specifications so that the chains do not compete with each other in purchasing beef of their respective specifications.

The complaints were filed in 1975. The cattlemen charge that the scheme violates section 1 of the Sherman Act, because it is a scheme "in restraint of trade and commerce". They also contend that the scheme was "an attempt to monopolize" and

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[5] As explained in Paragraph 28 of the Amended and Substituted Complaint in the *Meat Price Investigators Association* ("*MPIA*") suit:

> Cattle buyers for beef slaughterers figure the percentage of dressed meat on the live animal and give the cattle feeder a price for the live animal based on the Yellow Sheet or its west coast counterpart, the "Safeway price."

had the effect of monopolizing the wholesale beef market in violation of section 2 of the Act. The complaints also allege that the retail chains fix the retail price of beef to consumers. They request injunctive relief, under section 16 of the Clayton Act, and treble damages going back to the beginning of the alleged conspiracy. The Clayton Act's four-year statute of limitations would ordinarily operate to limit recovery to damages accruing within four years of the filing of the complaints.[6] The plaintiffs, however, urged that the defendants and their co-conspirators fraudulently concealed the conspiracy from the beginning, and that the statute of limitations therefore did not begin to run until the plaintiffs discovered, in July 1974, that the alleged conspirators had indeed met to discuss the pricing of beef.[7]

In late 1975, before the instant actions were consolidated in the Northern District of Texas, that court entered partial summary judgments in the *Pony Creek* case, a suit originally filed in the Northern District of Texas, dismissing with prejudice the *Pony Creek* plaintiffs' claims for damages that accrued prior to June 5, 1971. In December of 1976, following the consolidation of the various actions in the Northern District of Texas, the defendants filed motions for partial summary judgment on the statute of limitations issue in the remaining suits. The district court denied those motions. The *Pony Creek* plaintiffs filed a motion to vacate the earlier par-

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[6] Section 4B of the Act, 15 U.S.C. § 15b, states, in relevant part:

> Any action to enforce any cause of action under sections 15 or 15a of this title shall be forever barred unless commenced within four years after the cause of action accrued.

[7] That information was allegedly disclosed during discovery in *Bray, et al. v. Safeway Stores, et al.*, N.D.Cal., 392 F.Supp. 851 (1975), a suit virtually identical to the instant actions brought by California cattlemen against many of the defendants in these cases.

tial summary judgments entered against them, but the district court has not acted on that motion.

In June 1977 the defendants in all the cases filed a joint motion for judgment on the pleadings based on the Supreme Court's opinion in *Illinois Brick*. They pointed out the absence of any allegations that the plaintiffs had sold cattle directly to the defendant retail chains. The suits, they contended, were therefore barred by the general rule of *Illinois Brick* that only those parties who have dealt directly with members of a price-fixing conspiracy can maintain an antitrust action for damages against the price-fixers. The plaintiffs asked the district court to stay its ruling on the defendants' motion pending further discovery. Six months later, in December, 1977, the district court entered its order dismissing twelve of the suits for failure to state claims and striking the allegations of retail price-fixing. The court dismissed the remaining case—the *Little Ranch* case—in February 1977. All the cases were dismissed with prejudice.

II

We address first the most important issue in these appeals: Did the district court err in dismissing the appellants' claims for damages?

A

We meet at the outset questions about the applicability of *Illinois Brick* to these actions. The appellants' first line of attack on the district court's decision is the bold argument that *Illinois Brick* simply has no application to these actions. They also urge that, assuming *Illinois Brick* is relevant, the decision cannot bar damage claims against the National Provisioner and the grocery chain trude association because neither is a buyer or seller of beef. In the interests of clarity, our assessment of these contentions will begin with a discussion of the background and rationale of the *Illinois Brick* decision.

The *Illinois Brick* rule barring damages actions against alleged price-fixers by indirect purchasers has its genesis in *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 1968, 392 U.S. 481, 88 S.Ct. 2224, 20 L.Ed.2d 1231. *Hanover Shoe* involved an antitrust treble-damages suit under § 4 of the Clayton Act against a manufacturer of shoe machinery by one of its customers, a lessee of the machinery. The plaintiff claimed damages arising from the defendant's practice of leasing, rather than selling, the machinery, a practice that the plaintiff contended was a violation of section 2 of the Sherman Act. The Supreme Court affirmed the trial court's refusal to permit the defendant to prove up the defense that any illegal overcharges imposed on the lessee shoe manufacturer had been passed on to that manufacturer's customers. The Court referred to a "general tendency in the law" not to trace damages "beyond the first step". 392 U.S. at 488 n.6, 88 S.Ct. 2224, n.6 (quoting *Southern Pacific Co. v. Darnell-Taenzer Lumber Co.*, 1918, 245 U.S. 531, 38 S.Ct. 186, 62 L.Ed. 451).[8] The Court rejected the defendant's argument that the general rule should admit of an exception when economic circumstances are such that the overcharge to the buyer both caused

[8] Before *Illinois Brick*, a strong case could have been made that the *Hanover Shoe* decision rested primarily on the Court's perception that the middleman, and not the remote purchaser, is the likeliest enforcer of the antitrust laws. Although it is probable that Hanover, like most middlemen, passed on much of the overcharge, recognition of a passing-on defense would have reduced the incentives for middlemen to sue. Professor Posner has observed: "The choice was thus between overcompensating Hanover and underdeterring United. The Court's preference for the former is consistent with the view that the primary purpose of antitrust damage actions is to deter violations of law." R. Posner, *Antitrust Cases, Economic Notes and Other Materials* 149 (1974). *See Illinois Brick*, 431 U.S. at 752-53, 97 S.Ct. 2061 (Brennan, J., dissenting).

In *Illinois Brick*, however, the Court observed that the *Hanover Shoe* decision rested primarily on the difficulty-of-proof problem, and not on the deterrence rationale. *Illinois Brick*, 431 U.S. at 732 n. 12, 97 S.Ct. 2061 n. 12.

and enabled the buyer to pass on the full overcharge to his customers. The impact of the overcharge on the buyer's pricing decisions, said the Court, cannot be demonstrated with any precision in the ordinary case. 392 U.S. at 492-93,[9] 88 S.Ct. 2224. Recognition of a general passing-on defense would, in the Court's opinion, simply encourage defendants to attempt to establish its applicability, thus complicating and protracting many antitrust proceedings. *Id.* at 493, 88 S.Ct. 2224. The Court rejected the passing-on defense as a general matter and expressed its view that the defense should be permitted only in certain narrow circumstances when the concerns underlying its rejection in *Hanover Shoe* were not present. *Id.* at 494, 88 S.Ct. 2224.

Hanover Shoe barred defensive passing-on, the use of passing-on as a defense in an antitrust action. In *Illinois Brick*, the Court resolved a split of authority in the courts of appeals by ruling that, with few exceptions, indirect purchasers of an alleged price-fixer's product cannot maintain a treble damages action predicated on the offensive use of the theory that the price-fixer's over charge to his customer was passed on to the plaintiffs. The plaintiffs were separated from the price-fixing

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[9] Normally the impact of a single change in the relevant conditions cannot be measured after the fact; indeed a businessman may be unable to state whether, had one fact been different (a single supply less expensive, general economic conditions more buoyant, or the labor market tighter, for example), he would have chosen a different price. Equally difficult to determine, in the real economic world rather than an economist's hypothetical model, is what effect a change in the company's price will have on its total sales. Finally costs per unit for a different volume of total sales are hard to estimate. Even if it could be shown that the buyer raised his price in response to, and in the amount of, the overcharge and that his margin of profit and total sales had not thereafter declined, there would remain the nearly insuperable difficulty of demonstrating that the particular plaintiff could not or would not have raised his prices absent the overcharge or maintained the higher price had the overcharge been discontinued 392 U.S. at 492-93, 88 S.Ct. at 2231.

offenders by two intervening transactions: the bricks moved from the manufacturers through subcontractors and general contractors to the consumers, carrying a four-cent-per-brick overcharge each time the brick changed hands. The court decided that if *Hanover Shoe* were to be followed, offensive as well as defensive use of passing-on must be barred. The Court noted that recognition of a "one-sided" limitation on a passing-on theory of damages would lead to a "serious risk of multiple liability". If offensive use of passing-on were permitted, a price-fixer could be held liable to an indirect purchaser for the amount of the overcharge passed-on to that purchaser by the price-fixer's direct customer yet, lacking a passing-on defense (under *Hanover Shoe*), would be liable to the direct purchaser, his customer, for the full amount of the overcharge.[10] Further, the Court concluded that the rationale of *Hanover Shoe* had not depended on the defensive context in which passing-on was asserted in that case. The "uncertainties and difficulties in analyzing price and out-put decisions" in the real world, 431 U.S. at 731-32, 97 S.Ct. at 2068, the "principal basis" for the *Hanover Shoe* holding, *id.* at 731, 97 S.Ct. 2061, counseled rejection of offensive passing-on as well. Those same "evidentiary complexities and uncertainties"

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[10] A serious risk of overlapping liability would remain even under a rule permitting the offensive use of passing-on only in situations in which the defendant could use a passing-on defense, unless the scope of passing-on were narrowly restricted to cases in which the incidence of overcharges could be established with certainty. That risk would arise from the risk of inconsistent factfindings in separate lawsuits by direct and indirect purchasers. Note, *Scaling the Illinois Brick Wall: The Future of Indirect Purchasers in Antitrust Litigation*, 63 Cornel L. Rev. 309, 319 n.43 (1978). The magnitude of that risk would vary directly with the speculativeness of the proof of the incidence of the overcharge. By narrowly limiting the use of passing-on to cases in which the overcharge can be traced with ease and certainty, see part II, B of this opinion below, the Supreme Court has all but eliminated this risk of duplicative liability.

and undesirable delays would attend the effort of indirect purchasers to establish that illegal overcharges were passed on to them. *Id.* at 732, 97 S.Ct. 2061. The Court decided, therefore, that the passing-on theory of damages must be barred in those situations in which the defendant could not assert a passing-on defense against his direct purchasers. *Id.* at 735-36, 97 S.Ct. 2061.

[1] Because *Illinois Brick* adopted a unified "mutuality" approach to passing-on problems we must reject the appellants' argument that *Illinois Brick* has no application to these suits insofar as they seek relief for violations of Section 2 of the Sherman Act. Under *Illinois Brick*, the plaintiffs would be entitled to urge a pass-on theory of damages only if the defendant retail chains could use a passing-on defense to claims brought by the packers and slaughterers. Whether the plaintiffs can proceed on a passing-on theory of damages is, applying the mutuality principal, a question unaffected by their denomination of the claim. Absent exceptional circumstances, *Illinois Brick* and *Hanover Shoe* limit the use of passing-on theory in antitrust actions without regard to the parties' characterization of the offense.

The appellants' most ambitious contention is that *Illinois Brick* is entirely inapposite to price-fixing suits brought by sellers against indirect purchasers. They point out that *Illinois Brick* involved purchasers who charged price-fixing by a remote seller and contend that *Illinois Brick* should be limited to that type of case because the harm suffered by sellers in cases such as this one is much greater than the harm suffered by indirect purchasers in the paradigmatic *Illinois Brick*-type case. Especially is this so, they urge, when, as here, the alleged price-fixing conspiracy stands like a tollgate athwart the powerful "middle position" in the beef marketing system. The cattlemen's argument, we take it, is that the serious harm flow-

ing from monopsony or oligopsony price-fixing at a middle tier in an industry's structure outweighs the considerations, avoidance of overlapping liability and concern about complexities and uncertainties of proof, that underlay *Illinois Brick*—concerns that the Court may have overemphasized. *See* The Supreme Court, 1976 Term, 91 Harv. L.Rev. 70, 221-31 (1977).

The first step in assessing this argument is to examine the claim that the harm engendered by monopsony or oligopsony pricing of the kind alleged is, as a categorical matter, greater than that engendered by monopoly pricing. We focus first on monopsony or oligopsony pricing in general, without regard to the position occupied by the price-fixing combination in the productive chain. On this point, the appellants' contentions center on the harm suffered by the competitors themselves—the sellers. In the case of monopoly price-fixing, they say, the damaged buyer has a choice: he can refuse to buy the affected product and buy, instead, a substitute. In the monopsony or oligopsony price-fixing case, however, the seller faces a Hobson's choice: he can sell into the rigged market and take the depressed price, or he can refuse to sell at all. In their case, say the cattlemen, this means destroying fat cattle or, in the long run, cutting back production or going out of business.

We might acknowledge the difference as a general matter, but we have no reason to believe that the damage caused by the typical monopsony or oligopsony price-fixing scheme is significantly greater than that caused by the usual seller price-fixing scheme. Both types of price-fixing are attended by restrictions in industry output and the consequent reallocation of resources to less valuable uses.[11] The appellants argue that

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[11] *See generally* J. Hibdon, *Price and Welfare Theory* 244-53 (Monopoly pricing); 264-67 (Monopsony) (1969); K. George & J. Shorey, *The Allocation of Resources* 150-52 (1978).

the reallocation process in the monopsony price-fixing case is inherently more likely than in the monopoly price-fixing case to cause business failures.[12] Assuming this to be true, *arguendo*, we do not think that this distinction is sufficient to warrant disparate treatment of monopoly and oligopsony for purposes of pass-on problems. If the *Illinois Brick* decision is grounded on a balancing of the deterrence and compensation policies of the treble-damages action against considerations of judicial economy and fairness to defendants—a view of *Illinois Brick* that is crucial to the appellants' argument[13]

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[12] In the case of monopoly price-fixing, the price-fixing generally raises the price of all goods that incorporate the product subject to the price-fixing. If the conspirators sell directly to the consuming public, the only businesses adversely affected are those in industries that supply complementary goods. If the conspirators do not sell directly to the consuming public, then the product is but an input in the production of other goods or services. By raising the cost of that input, the price-fixing conspiracy might conceivably have the effect of driving marginal firms that use the input out of the market. The likelihood of this occurring depends upon the magnitude of the cost of the input relative to the purchasing firm's total costs of production and on the elasticity of demand for the firm's product. A fifteen percent rise in the cost of beef, for example, threatens the profitability of a steakhouse far more than that of a grocery store. The impact will be greatest in the rare case of a firm that simply buys and resells only the good affected by the price-fixing conspiracy.

Most firms that sell directly to the typical monopsony or oligopsony price-fixing conspiracy, however, are in a position analogous to that of the single-product distributor who purchases his product from price-fixing conspirators. The good affected by the price-fixing conspiracy is likely to be the seller's only product or to represent a significant percentage of the seller's output. In general, the impact on a firm's revenues of a purchaser price-fixing scheme aimed at the product it sells is greater than the impact on a firm's costs of a monopoly price-fixing scheme affecting an input into the firm's product.

[13] If *Illinois Brick* did not involve such a balancing, even implicitly, then the appellants' argument that the greater harm flowing from purchaser, as compared with seller, price-fixing, justifies special treatment of passing-on problems in monopsony cases loses its premise. Formally, at least, *Illinois Brick* involved no such balancing as suggested in the text. The *Illinois Brick* holding is essentially the rule of mutuality. That rule was justified almost entirely by reference to the problem of overlapping liability, and the Court's focus on the risk of overlapping liability was a result

—it seems to us that the Supreme Court chose to permit entire price-fixing schemes, in some circumstances, to go unremedied by private damage actions. If the Court felt that competing considerations outweigh the costs of leaving unremedied the totality of harm flowing from some monopoly price-fixing schemes, we find it difficult to believe that the incremental harm, in the form of possible business failures, that might flow from unremedied monopsony or oligopsony price-fixing schemes would tip the Court's balance in favor of enforcement in the purchaser price-fixing case. The increment is too insignificant in comparison with the total damage caused by price-fixing.

The appellants urge that the Supreme Court has recognized that conspiracies aimed at sellers are especially abhorrent. None of the cases they cite, however, establish anything more than the unsurprising proposition that producers damaged by anti-competitive schemes have a remedy under the antitrust laws.[14] As support for their contention that conspiracies at the strategic middle position or "bottleneck" in an industry's structure are especially disfavored, they cite the Supreme Court's decisions in *American Tabacco Co. v. United States,*

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of its assumption that direct purchasers, as well as indirect, would likely sue the price-fixers. On the surface of it then, *Illinois Brick* does not acknowledge that its pass-on rule involves any significant sacrifice of antitrust enforcement: in those cases in which the rule bars indirect purchasers from suing, the direct purchasers, it is assumed, will likely come to the fore.

[14] *E.g., Zenith Radio Corp. v. Hazeltine Research, Inc.,* 1969, 395 U.S. 100, 89 S.Ct. 1562, 23 L.Ed.2d 129; *Continental Ore v. Union Carbide & Carton Co.,* 1962, 370 U.S. 690, 82 S.Ct. 1404, 8 L.Ed.2d 777; *Klor's Inc. v. Broadway Hale Stores, Inc.,* 1959, 359 U.S. 207, 79 S.Ct. 705, 3 L.Ed.2d 741; *Mandeville Island Farms v. American Crystal Co.,* 1948, 334 U.S. 219, 68 S.Ct. 996, 92 L.Ed. 1328. The cases cited by the appellants, with the exception of *Mandeville Island Farms,* were cases involving monopolization or exclusionary practices, not price-fixing. None involved passing-on theories of damage.

1946, 328 U.S. 781, 66 S.Ct. 1125, 90 L.Ed. 1575, and *Standard Oil Co. of New Jersey v. United States*, 1191 221 U.S. 1, 31 S.Ct. 502, 55 L.Ed. 619. Those decisions, it is true, recognize the seriousness of monopsony or oligopsony at the dominant middle of an important industry's productive chain, but they do not single out that situation for special treatment under antitrust laws. We cannot carve from an important antitrust rule intended to be of general application exceptions based on the sheer magnitude or impact of the particular conspiracy alleged.

[2] We conclude that there is nothing special about monopsony or oligopsony price-fixing cases that justifies treating them differently from monopoly price-fixing cases for passing-on purposes. *Illinois Brick* therefore speaks to the instant cases.

A final issue as to the applicability of the *Illinois Brick* rule concerns the appellants' cases against the National Provisioner and the National Association of Food Chains. The appellants argue that the *Hanover Shoe-Illinois Brick* limitations on the use of passing-on theory apply only to suits brought against firms that are in the chain of production. They theorize that the "central rationale" of the *Hanover Shoe* and *Illinois Brick* decisions is that firms dealing directly with the alleged price-fixer are likelier than firms remote in the productive chain to sue and that severe limitations on the use of passing-on theory are necessary lest direct-dealing firms be discouraged from bringing suit. Because the trade publication and the trade association do not buy or sell beef at all, the argument continues, there are no firms in the beef marketing system that deal directly with these defendants. The cattlemen, the appellants conclude, are as likely as anyone to bring suit against those defendants.

[3] The argument rests on a faulty premise. The *Illinois Brick* decision rested on avoidance of overlapping liability and on concern about the complexities and uncertainties of proof that would attend general recognition of passing on theories of damage. What is critical is not whether a defendant competes in the relevant industry but whether the plaintiff's action (or the defendant's defense) asserts a form of passing-on theory. The complaints in these cases do so. The National Provisioner and the National Association of Retail Chains do not buy or sell beef but the appellants' complaints charge that they conspired with firms that do buy beef to fix the purchase price of boxed and carcass beef. That the trade publication and trade association defendants do not market beef does not diminish the problems of overlapping liability and uncertainty of proof posed by the use of a passing-on theory of damages. The doctrine of *Illinois Brick* therefore applies to the complaints against these two defendants.

B

Having determined that the *Hanover Shoe-Illinois Brick* doctrine applies to the damages claims in their entirety we turn to the appellants' contentions that these actions fit recognized exceptions to the bar against use of passing-on theory.

1. The Co-Conspirator Exception.

Certain of the appellants contend that the complaints in these actions, liberally construed, allege a conspiracy between the retail chains, on the one hand, and the packers and slaughterers on the other.[15] They argue for an exception from the

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[15] Indeed, many of the allegations strongly suggest that all the non-defendant co-conspirators adverted to in the complaints are food retailers. Paragraph 34 of the MPIA Amended and Substituted Complaint, for example, states in part:

> b. Specifications have been established by the defendant retail food chains and other co-conspirators for the beef they buy. In most instances, the specifications for beef carcasses or parts

Illinois Brick rule for cases involving a conspiracy between the remote price-fixers and the direct-dealing intermediary.

They argue, first, that cases involving conspiracy spanning two levels in the chain of distribution fit the exception recognized in *Illinois Brick* for cases in which the defendant owned or controlled its customer (the middleman). *Illinois Brick*, 431 U.S. at 736 n.16, 97 S.Ct. 2061 n.16.[16] If the retail chains conspired with the packers and slaughterers, they urge, the retailer can be said to have "controlled" the middleman within the meaning of footnote 16 of *Illinois Brick*. Market forces would have been superseded in such circumstances. There would then be no indirect dealing problem, it is argued, since those selling to the packers and slaughterers would have dealt directly with the price-fixing conspiracy.

Even if proof of a multilevel conspiracy would not bring the case within the "control" exception recognized in *Illinois*

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thereof have varied . . . thus eliminating competition between and among the defendants and other co-conspirators.

c. The defendant food chains and other co-conspirators have allocated retail marketing areas . . . .

d. The defendant food chains and other co-conspirators have agreed not to compete with one another on a price basis in purchasing beef at wholesale . . . .

e. . . . Through uniform entry into the wholesale beef market or uniform withdrawal from the wholesale beef market, the defendant food chains and other co-conspirators have combined to monopolize to affect the demand for beef products and artificially depress the wholesale price of beef products to an unreasonably low level, which level is directly reflected by the Yellow Sheet price and the 'Safeway price,' and which prices are directly passed on to the beef producer.

[16] "Another situation in which market losses have been superseded and the pass-on defense might be permitted is where the direct purchaser is owned or controlled by its customer. Cf. *Perkins v. Standard Oil Co.*, 395 U.S. 642, 648, 89 S.Ct. 1871, 1874, 23 L.Ed.2d 599 (1969); *In re Western Liquid Asphalt Cases*, 487 F.2d 191 [at] 197, 199." But "reliance upon direct purchasers to bring suit is wholly unjustified when they are controlled by the prospective defendants". The Supreme Court, 1976, 91 Harv.L.Rev. 70, 230 (1977).

Brick, it is urged, we should recognize a distinct exception for vertical conspiracies. The appellants argue that the defendants remote from the plaintiffs in the chain of distribution do not run the risk of double liability if it is proved that the intermediary was an equal participant in the price-fixing conspiracy, for the co-conspirator intermediary could not recover in a suit against the remote seller or purchaser. This is so, they say, because "when parties of substantially equal economic strength mutually participate in the formation and execution of the scheme and bear equal responsibility for the consequent restraint of trade, each is barred from seeking treble damages from the other". *Columbia Nitrogen Corp. v. Royster Co.*, 4 Cir. 1971, 451 F.2d 3, 15. *See also Premier Electrical Constr. Co. v. Miller-Davis Co.*, 7 Cir. 1970, 422 F.2d 1132, *cert. denied*, 1970, 400 U.S. 828, 91 S.Ct. 56, 27 L.Ed.2d 58.

As the appellees point out, however, the co-conspiracy theory now urged by the plaintiffs-appellants was not set forth in the complaints. The theory of the complaints, both before and after the *Illinois Brick* decision, was that the defendants conspired to fix the prices paid to packers and that the packers simply "passed on" the price depression to cattlemen. Certain allegations in the complaints refer to unnamed co-conspirators, and the appellants now contend that the packers and slaughterers are included among those unnamed co-conspirators. Various paragraphs in the complaints refer to the unnamed co-conspirators as nondefendant food retailers. Nothing in the complaints, however, suggests that packers or other intermediaries conspired with the defendants. In their joint reply brief the appellants cite paragraph 34 of the *MPIA* and *Becker* Amended Complaints as an example of a

packer conspiracy allegation.[17] That paragraph, however, states merely that most slaughterers and packers have standing agreements with the defendant chain stores to supply fixed quantities of beef each week, and that the Yellow Sheet or "Safeway" price paid the packer sets the price that the packers pay the plaintiffs for their cattle. This is merely an allegation of passing-on, not of conspiracy. No agreement to fix prices is alleged. If the act of passing-on sufficed to brand the intermediary as a co-conspirator the asserted exception would wholly swallow the *Hanover Shoe-Illionis Brick,* rule.

[4] The appellants urge that the district court abused its discretion by failing to give them adequate opportunity to amend their complaints, after the *Illinois Brick* decision, to allege a vertical conspiracy, and by denying post-judgment requests for leave to amend. We do not agree.

[5] Leave to amend pleadings should be granted liberally when previously unimportant factual issues gain significance as the result of rulings on a point of law handed down during the pendency of the litigation. *E.g., Commissioner of Internal Revenue v. Estate of Donnell,* 5 Cir. 1969, 417 F.2d 106. In none of these cases, however did the district court before the entry of its dismissal order deny the plaintiffs leave to amend their complaints in light of *Illinois Brick.* And all plaintiffs had a reasonable opportunity to amend before the district court ruled on the defendants' dismissal motions. Those mo-

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[17] That paragraph states:

> Most slaughterers and packers have standing agreements with various receivers, including the defendant chain stores and other co-conspirators, for certain quantities of beef each week. With knowledge of their weekly requirements and of the prices quoted in the Yellow Sheet or the "Safeway Price," the packers and slaughterers directly pass down the price established by the defendant retail food chains. The packers and slaughterers in aggregate do not suffer any diminution of sales, purchases, margins or profits as a result of this artificially low price.

tions, based on *Illinois Brick*, were filed on July 17, 1977, eight days after the Supreme Court's decision. The district court did not rule on the motions until October, 1977. In three of the suits, the *MPIA*, *Becker*, and *Petersen* suits, the complaints were amended, with leave of court, after the filing of the defendants' motions to dismiss. None of those complaints, however, adequately alleged conspiracy. The plaintiffs in the remaining suits stood on the allegations of their complaints, asserting that the "unnamed" co-conspirators mentioned therein were indeed packers and slaughterers. Following the court's communication of its decision to the parties, an attorney for one of the plaintiffs requested that the dismissal be "without prejudice", but none of the plaintiffs attempted to amend the complaints until the *Black* and *Pony Creek* plaintiffs, *after* the court's December 9 entry of its order dismissing the suits with prejudice, filed motions for leave to amend.

The district court did not abuse its discretion in denying the post-judgment motions for leave to amend. Rule 15(a) of the Federal Rules of Civil Procedure requires that leave to amend be freely granted "when justice so requires". The Supreme Court has said that motions to amend may properly be denied when there has been undue delay in moving for leave to amend. *Foman v. Davis*, 1962, 371 U.S. 178, 182, 83 S.Ct. 227, 9 L.Ed.2d 222. The plaintiffs have offered no credible explanation for their failure to move for leave to amend until nearly five months after the defendants moved for dismissal on the basis of *Illinois Brick*.[18] Absent any apparent justification for this delay, we cannot hold that the district court abused its discretion. We emphasize, moreover, that these motions were made after the court's entry of the dismissal orders

[18] The only explanation given is the *Chapparal* plaintiffs' lame assertion that it took a long time to divine the meaning and implications of the *Illinois Brick* decision.

and after the movants had, in their legal memoranda in support of their opposition to the motion to dismiss, asserted that they stood, in regard to the co-conspiracy issue, on the allegations of their existing complaints. The plaintiffs tested the theory that their embellished allegations of passing-on were equivalent to allegations of packer complicity in the price-fixing conspiracy and lost. We have said before that

> [m]uch of the value of summary judgment procedure . . . would be dissipated if a party were free to rely on one theory in an attempt to defeat a motion for summary judgment and then, should the theory prove unsound, come back long thereafter and fight on the basis of some other theory.

Freeman v. Continental Gin Co., 5 Cir. 1967, 381 F.2d 459, 469-70.

The Supreme Court in *Foman* also declared that denial of leave to amend is proper when the proposed amendment would be futile. *Foman v. Davis, supra*, 371 U.S. at 182, 83 S.Ct. 227. The district court's denial of the post-judgment motions was supportable on this ground as well. Amendment of the complaints to allege a vertical conspiracy would not have brought these actions within the "control" exception in *Illinois Brick*. In footnote 16 of *Illinois Brick* the Court suggested the intended scope of the "control" exception by citing the Ninth Circuit's decision in *In re Western Liquid Asphalt Cases*, 1973, 487 F.2d 191, *cert. denied*, 415 U.S. 919, 94 S.Ct. 1419, 39 L.Ed.2d 474. In that case there was evidence tending to show that the defendants controlled their direct customers "either through acquisition of stock, or indirectly through various financial arrangements, including credit". *Id.* at 195. It has been suggested that "courts should invoke the exception only to ensure that sellers do not insulate themselves from suit . . .

by strongarming direct purchasers into choosing not to sue". Note, *Scaling the Illinois Brick Wall: The Future of Indirect Purchasers in Antitrust Litigation*, 63 Cornell L.Rev. 309, 328-29 (1978). The plaintiffs in these suits have never suggested that the grocery chains "controlled" the packers or slaughterhouses, either through stock ownership or credit arrangements. Indeed, the plaintiffs proposed to amend their complaints to allege a vertical conspiracy, not to allege arrangements by which the defendants controlled the packers and slaughterhouses.

Nor did we think that allegations of conspiracy would bring these cases within an exception for suits alleging vertical conspiracy. It is true that some courts have acknowledged such an exception. *E.g., Florida Power Corp. v. Granlund*, M.D. Fla., 1978, 78 F.R.D. 441; *Donson Stores, Inc. v. American Bakeries Co.*, S.D.N.Y., 1973, 58 F.R.D. 481. Whatever the merits of the arguments for such an exception in general, we do not think that the reasoning of *Illinois Brick* permits recognizing the exception when, as here, the alleged co-conspirator middlemen are not named as parties defendant. Absent joinder of the packers and slaughterhouses, the rule forbidding one antitrust conspirator from maintaining an action against another for damages arising from the joint activity would not protect these defendants from the risk of overlapping liability. The retail chains could not, in a suit brought by the packers, use a judgment or finding of vertical conspiracy in the instant case to prevent the packers from successfully asserting in their own lawsuit that they did not in fact conspire with the chains and are therefore not barred by the co-conspirator doctrine from recovering damages from the retail chains. *E.g., Mosher Steel Corp. v. N. L. R. B.*, 5 Cir. 1978, 568 F.2d 436. Because the packers are not parties to this suit, the possibility

of inconsistent adjudications on the issue of the existence of a vertical conspiracy leaves the defendants subject to the risk of multiple liability that the *Illinois Brick* Court found unacceptable.

For these reasons we uphold the district court's refusal to permit post-judgment amendments to the complaints.

2. The "Cost-Plus" Exception.

The appellants urge that outright dismissal of their damage claims was error because the complaints stated good claims within the "cost-plus contract" exception in *Illinois Brick.*

The Supreme Court acknowledged in *Hanover Shoe* "that there might be situations—for instance, when an overcharged buyer has a pre-existing 'cost-plus' contract, thus making it easy to prove that he has not been damaged—when the considerations requiring that the passing-on defense not be permitted in this case would not be present". 392 U.S. at 494, 88 S.Ct. at 2232. The Court in *Hanover Shoe* seemed to suggest a general exception to the bar against assertion of a passing-on defense, an exception defined by the policies underlying the bar. Cases in which the middleman's customer is obligated under a preexisting cost-plus contract to purchase a fixed quantity of goods are paradigmatic of this exception. The proof—the contract itself and evidence of its performance—is simple and unequivocal.[19] Uncertainties of proof are thus

[19] In *Hanover Shoe* the Court emphasized the inadequacy of economic theory to the task of tracing the incidence of an overcharge. *See* note 7, *supra.* In *Illinois Brick* the Court elaborated on the point. The Court noted that economic theory provides a formula for determining the incidence of an overcharge, but that the analysis rests on "an array of simplifying assumptions" and assumes knowledge of elasticities of supply and demand in the relevant market. 431 U.S. at 741-42, 97 S.Ct. 2061. The unacceptability of the assumptions and the near-impossibility of measuring the relevant elasticities renders such incidence analysis little more than a guessing game in practice, the Court seemed to suggest. The Court was concerned not so much with the complexity of such proof as with its speculative character.

avoided. The risk of overlapping liability is eliminated or reduced to the barest minimum inasmuch as the evidence is not susceptible of differing interpretations and is unlikely to be accepted in one lawsuit and rejected in another.

As we understand these cases, the Court meant the scope of the exception to be narrow, but it did not imply that only cases involving cost-plus contracts qualify. Commentators have observed that *Hanover Shoe* and *Illinois Brick* permit the assertion of passing-on in situations that are the functional equivalent of the cost-plus contract case. *E.g.*, Note, *Recovery by Indirect Purchasers and the Functions of Antitrust Treble Damages*, 55 Texas L.Rev. 1445, 1454-57 (1978). "Although the Court intended the exception to have a 'narrow scope', any situation in which [the impact of] the overcharge is essentially determined in advance 'without reference to the interactions of supply and demand' would function in the same way." Note, *Scaling the Illinois Brick Wall: The Future of Indirect Purchasers in Antitrust Litigation*, 63 Cornell L.Rev. 309, 331 n.93 (1978) [citations omitted]. When the impact of an overcharge on a middleman's pricing decisions can be so determined, the uncertainties involved in resorting to general economic theorems are avoided and the clarity of the evidence virtually eliminates the possibility of overlapping liabilities as the result of inconsistent verdicts in separate lawsuits. Functional equivalence is not lost simply because the proponent of passing-on theory cannot demonstrate that the middleman suffered no loss in volume as the result of raising the price to his customers.[20] In the cost-plus

[20] In *Yoder Bros., Inc. v. California-Florida Plant Corp.*, 5 Cir., 1976, 537 F.2d 1347, *cert. denied*, 429 U.S. 1094, 97 S.Ct. 1108, 51 L.Ed.2d 540, a panel of this Court reversed a treble damages judgment that was erroneously reduced by recognition at trial of a passing-on defense. The Court ruled that the defense was not available because the evidence of the party asserting the defense did not demonstrate the applicability of the cost-plus exception suggested

contract case itself, the middleman is likely to have suffered a loss of volume and hence profits as a result of the over-

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in *Hanover Shoe*. The Court found that the evidence did not show the effect of a price change on the direct purchaser's total sales or unit costs for a different sales volume. Under the rule of *Yoder Bros.*, the passing-on defense is unavailable absent evidence that the direct purchaser did not suffer harm in the form of lost sales volume, even if it is proved that the direct purchaser passed on the entirety of the overcharge.

Application of the *Illinois Brick* mutuality principle would suggest that, because under *Yoder Bros.* these defendants could not assert a passing-on defense at all in a treble damages suit brought by the packers and slaughterers absent proof that the packers and slaughterers suffered no loss of volume as a result of the alleged price-fixing, the cattlemen should be barred from using passing-on theory offensively against the defendants unless they demonstrate that the packers and slaughterers suffered no loss of volume. If this is so, then the bar against use of passing-on is absolute, for it would be impossible, not simply "virtually" impossible, to make such a showing. Indeed, *Yoder Bros.* has the effect of eliminating the passing-on defense altogether, except perhaps in the very narrow case of a pre-existing, fixed quantity cost-plus contract.

We do not believe, however, that the *Yoder Bros.* Court's treatment of the pass-on issue is viable after *Illinois Brick*. The *Yoder Bros.* Court's very literal reading of *Hanover Shoe* to require parties asserting a pass-on defense to prove that the intermediary suffered no harm whatsoever rested, we think, on its view that the private treble damage action is of "overriding importance . . . in the antitrust enforcement scheme." *Id.* at 1375. Indeed, *Hanover Shoe* was plausibly read, before *Illinois Brick*, as resting on the view that the strong policy in favor of antitrust enforcement justifies buying enforcement at the expense of overcompensating plaintiffs. *See* note 6 *supra*. In *Illinois Brick*, however, the Court denigrated the importance of the antitrust enforcement rationale in the decision of *Hanover Shoe* and characterized the difficulty-of-proof problem as the key to *Hanover Shoe*. 431 U.S. at 732 n.12, 97 S.Ct. 2061 n.12. Indeed, *Illinois Brick* itself demonstrated that the policy in favor of vigorous antitrust enforcement must sometimes give way in face of the risk of overpunishing antitrust violators. The *Yoder Bros.* panel would not have taken so niggardly a view of the passing-on defense had it had the benefit of the *Illinois Brick* Court's interpretation of the *Hanover Shoe* opinion, or had it known the implications that its decision might have for antitrust plaintiffs after *Illinois Brick*.

Post-*Illinois Brick* commentary, moreover, has generally assumed that the issue of the impact on the direct purchaser's sales volume of an overcharge should not be dispositive in a case involving the offensive use of passing-on theory. *E.g.*, Note, *Recovery by Indirect Purchasers and the Functions of Antitrust Treble Damages*, 55 Texas L.Rev. 1445, 1455 n.69 (1977). *See also*, Note, *Scaling the Illinois Brick Wall: The Future of Indirect Purchasers in Antitrust Litigation*, 63 Cornel L.Rev. 309, 329 n.87 (1978).

charge. His higher selling price will likely have caused potential customers to forego his product. *See* Note, 63 Cornell L. Rev. 309, 329 n.87. The middleman's loss of volume and the indirect purchaser's absorption of the overcharge are wholly separable items of damage.

[6] Applying these principles, we conclude that the district court erred in dismissing these actions. The dismissal, we emphasize, was on the pleadings. The question at the pleading stage is simply whether the allegations of the complaints state a case within the "cost-plus" exception. The complaints sufficiently allege that the impact of the retail chains' price changes upon the pricing decisions of the packers is determined in advance without regard to the interactions of supply and demand. The plaintiffs allege that the packers set the price of live cattle by strictly applying certain formulae to the Yellow Sheet or Safeway wholesale beef price. Under these allegations a plaintiff would be entitled, once he proved what the competitive wholesale price would have been for a given grade of beef in a given region at a given time, and once he established that the packer to whom he sold strictly applied a formula to the Yellow Sheet price for the particular sale, to damages in the amount of the difference between the price he actually received on that sale of fat cattle and the price he would have received absent price-fixing (computed by applying the packer's formula to the constructed competitive wholesale price). The packer's habitual use of predetermined formulae[21] would enable measurement of the effect on prices for

[21] Because these cases come up on appeal from dismissals on the pleadings, we are not concerned with the question whether packers and slaughterers in fact applied pricing formulae without deviation, or with the question whether the formulae employed were such that a change in wholesale prices in a given region had a predetermined effect on the price offered feeders in the region by the packers and the slaughterers. We must assume, for purposes of these appeals, that the plaintiffs could demonstrate that both quesions are to be answered in the affirmative.

fat cattle of changes in wholesale prices.[22] The plaintiffs have alleged the functional equivalent of cost-plus contracts.

We do not agree with the appellees that the packer pricing mechanism alleged is exactly analogous to the "fixed percentage markup" or cost-based pricing systems rejected by the *Illinois Brick* Court as exceptions to the passing-on rule. In *Illinois Brick* the Court refused to recognize an exception where middlemen "purport" to charge a fixed percentage markup. 431 U.S. at 743, 97 S.Ct. 2061. Here it is alleged that the packers *in fact* engaged in formula pricing. The Court in *Illinois Brick* was skeptical of the plaintiffs' claims because there is evidence that firms purporting to apply fixed markups above costs in fact fit the markup to the elasticity of demand for the product or juggle cost allocations to achieve the same result. F. Scherer, *Industrial Market Structure and Economic Performance* 176 (1970). An intermediary, such as a contractor in *Illinois Brick*, who employs numerous inputs in assembling his final product might bear the larger brunt of an increase in the price of one of his inputs without leaving any evidence that he did so. It is alleged that the intermediaries in these cases determine their purchase price for fat cattle by rigid application of formulae to the wholesale price for carcass beef. Assuming the allegations of the com-

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[22] In *Hanover Shoe* the Court pointed out that in attempting to prove a pass-on a litigant would have to demonstrate that the intermediary would not have raised his price absent the overcharge. 392 U.S. at 493 and n.9, 88 S.Ct. 2224 and n.9. This is a causation issue. The Court's general rejection of the use of passing-on theory rested in part on its view that this issue of causation could not, except in rare cases, be resolved with adequate certainty. *See* note 17 *supra*. If, however, an intermediary over a long period of time consistently determines his purchase price by applying a fixed formula to the price he will receive when he in turn sells, the objection based on the speculativeness of the causation evidence disappears. Our legal system routinely permits triers of fact, as indeed it must, to infer causation, or the lack of causation, from the observation of deviation *vel non* from long-indulged habit or practice.

plaints to be true, a packer's absorption of a loss resulting directly from a decrease in the wholesale price would be detectable from a change in his purchasing formulae or from his paying a price for fat cattle that is above the price he would have paid had he adhered to his customary formulae. It is alleged, moreover, that the packers have no reason to depart from their purchasing formulae in the short run because short term supply is, by the very nature of cattle production, highly inelastic.

We recognize that it might be said that we are engaging in "the process of classifying various market situations according to the amount of pass-on likely to be involved and its susceptibility of proof in a judicial forum". *See Illinois Brick*, 431 U.S. at 744-45, 97 S.Ct. at 2074. But the Supreme Court itself engaged in such a process in suggesting exceptions to its bar against the use of passing-on theories. If allegations of structural inelasticity of short term supply and of rigid formula pricing by intermediaries do not bring a case within the cost-plus exception for purposes of a motion to dismiss on the pleadings, then the cost-plus exception is a narrow one indeed, and must include only cases involving literal cost-plus contracts.[23] In light of the purposes behind the passing-on bar—preventing duplicative recoveries and avoiding the uncertainties involved in the use of incidence theory—the situation alleged in these complaints is the functional equivalent of the cost-plus contract case.

[7] The appellees are correct in asserting that the proposed proof of damages is far from simple. It will require detailed proof as to individual transactions. Attention must focus on the type and grade of cattle sold, and on whether (and which) pricing formulae were used by packers in mak-

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[23] That view was recently taken by the Third Circuit Court of Appeals in *Mid-West Paper Products Co. v. Continental Groups, Inc.*, 596 F.2d 573 (1979), *as amended* April 5, 1979.

ing particular purchases. The proof must be detailed and particular. But this is a complexity born of quantity. The *kinds* of proof that will be involved, however, are not new to courts, and certainly not to antitrust courts. The cases as pleaded escape *Illinois Brick* only insofar as they avoid the use of general economic theory in tracing the effect of the defendants' price decisions, and only insofar as they can be proved, in the damages phase, with certainty. If, as to a particular transaction, it cannot be clearly shown that the purcashing packer applied a specific price formula, or if other details of a transaction, such as the quantity or grade of cattle, are not available, then the plaintiff cannot recover damages as to that sale.[24]

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[24] The appellees have suggested that the plaintiffs will have to trace their cattle through the chain of production to establish that the cattle they sold to packers and slaughterhouses were in turn sold, in carcass form, to members of the alleged retail chain conspiracy. If the prices allegedly established by the defendants were uniformly followed by the beef retailing industry, as the plaintiffs allege, however, tracing would be unnecessary. The plaintiffs' theory of damages is not in all respects a pass-on type of theory. Their theory, stated most broadly, is that the activities of the alleged price-fixing conspiracy depressed wholesale prices generally, and not simply the prices paid by members of the conspiracy, and that packers and slaughterers based their purchases of live cattle on the depressed wholesale price. It is immaterial whether or not a steer purchased from a plaintiff found its way into the hands of a conspirator retailer. It is enough if, as alleged, the conspirators' activities caused a general depression in wholesale prices and the intermediary purchasing from a plaintiff based his pricing decision on the depressed wholesale beef price.

We disagree with the recent ruling of a divided panel of the Third Circuit Court of Appeals that one who deals with a nonconspiring competitor of price-fixing firms lacks standing to sue those firms for treble damages. *See Mid-West Paper Products Co. v. Continental Group, Inc., supra* note 23, 596 F.2d 587. That decision supports the appellees' contention, for if a person who deals directly with a nonconspiring competitor lacks standing, then an indirect purchaser from, or an indirect seller to, a nonconspiring competitor of the defendants *a fortiori* lacks standing. We agree with the dissent in *Mid-West Paper Products* that such a plaintiff satisifies the "target area" test for standing, *see* Part IV below, and that the injury suffered by such a plaintiff satisfies the tests for proximate causation. *See* 596 F.2d at 597.

We reverse the district court's dismissal orders. Because the pleadings state a case within the cost-plus exception. We emphasize that we are not ruling that these plaintiffs are entitled to go to trial. The Supreme Court intended that it be determined early in the litigation whether (or to what extent) a party should be entitled to present a pass-on theory at trial. The defendants will have the opportunity to raise that issue again by summary judgment motion. Given the strictures of *Hanover Shoe* and *Illinois Brick*, the district court may and should demand from the plaintiffs in each case a pretrial demonstration that they have definite and particularized proof that they will need to establish damages. Nor does our ruling imply that the plaintiffs may attempt to trace damages beyond the tier comprised of those who sell directly to the packers or slaughterers. Under the allegations of the complaint only those plaintiffs who sold directly to the packers or slaughterers that engaged in strict formula buying are entitled to maintain damage claims. The complaints do not allege that feeders or brokers "passed on" price depressions to ranchers or that they engaged in strict formula buying based solely on Yellow Sheet prices.

III.

The appellants also appeal the dismissal of their claims for injunctive relief on the basis of *Illinois Brick*. It follows from our ruling that it was error to dismiss the damage claims on the pleadings that it was also error to dismiss the claims for injunctive relief on the pleadings. Our disposition of the injunctive relief issue, however, rests on the broader ground that the *Illinois Brick* rule has no application to claims for injunctive relief.

[8] We agree with the reasoning of *Mid-West Paper Prods. Co. v. Continental Group, Inc.*, 3 Cir. 1979, 596 F.2d

573, *as amended* April 5, 1979. The court in that case ruled that *Illinois Brick* does not bar suits for injunctive relief by indirect purchasers in price-fixing actions because the policy considerations underlying the pass-on rule are not implicated in claims for injunctive relief. An injunctive suit does not expose a defendant to monetary liability at all, much less to the risk of duplicative liability, and does not require the trier of fact to determine the incidence of the overcharge. To secure injunctive relief under section 16 of the Clayton Act, the plaintiffs need show only "threatened loss or damage by a violation of the antitrust laws". 15 U.S.C. § 26. To show a threat of such injury, plaintiffs in a case such as this would not have to show the extent of their harm. It would suffice to show by a preponderance of the evidence that the alleged price-fixing had or will have some adverse impact on the prices they receive for their cattle, or that the conspirary reduced the packers' demand for fat cattle.

The appellees argue that injunctive relief is barred to indirect sellers or purchasers whose damage claims are barred by *Illinois Brick* because *Illinois Brick* holds that such persons are not injured within the meaning of section 4 of the Clayton Act. Section 4 and section 16, they point out, are coextensive except that section 16, unlike section 4, does not require an injury to the plaintiff's "business or property". It therefore follows, it is urged, that indirect sellers or purchasers barred from section 4 treble damages by the *Illinois Brick* rule are not threatened with legally cognizable injury within the meaning of section 16.

We disagree with the appellees' characterization of the *Illinois Brick* decision. Formally, it is true, both *Hanover Shoe* and *Illinois Brick* held that, with the exceptions previously discussed, the overcharged direct purchaser, and not the indi-

rect purchaser who may ultimately bear part of the overcharge, suffers the full injury for purposes of section 4. Had those decisions even purported to rest on a divination of the original meaning of section 4 of the Act we would agree with the appellees that *Illinois Brick* has clear implications for injunctive actions under section 16 as well. But neither *Hanover Shoe* nor *Illinois Brick* involved statutory construction in the ordinary sense. They are judicial glosses on an old statute, predicated on contemporary policy considerations. The implications of those decisions therefore reach only as far as the policy considerations informing them.

IV.

In its December 1977 order dismissing the actions, the district court granted the defendants' motion to strike allegations of retail price-fixing from the complaints. Those allegations charged the retail chains with conspiring to set artificially high prices for beef sold to retail consumers. The plaintiffs in all the suits appeal that action.

[9] It was error to strike the allegations of retail price-fixing in the *Agee* and *Varian* complaints.[25] These complaints allege that some of the plaintiffs have purchased beef as consumers at prices affected by the alleged conspiracy. Such an allegation is an adequate allegation of the injury to one's "property" within the meaning of section 4 of the Clayton Act. *Reiter v. Sonotone Corp.*, —— U.S. ——, 99 S.Ct. 2326, 60 L.Ed.2d 931 (1979). That the allegations might have been added to the complaint in the effort to inject highly prejudicial matter into a lawsuit that is primarily based on wholesale price-fixing, as the appellees charge, is of no consequence,

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[25] The *Agee* suit has been restyled *Shoshone Tribe of Duckwater, et al. v. Safeway Stores, Inc., et al.* We follow the parties' practice of referring to the case as "*Agee*".

for Rule 18(a) of the Federal Rules of Civil Procedure grants the plaintiffs complete freedom to join in a single action all claims that they may have against any of the defendants. 6 C. Wright & A. Miller, *Federal Practice and Procedure* § 1582 (1971).

It was not error, however, to strike the retail price-fixing allegations from the remaining complaints. With the exception of the *Agee* and *Varian* complaints, none of the complaints alleged injury to the plaintiffs' business or property within the meaning of the Clayton Act. The appellants contend that they have adequately alleged injury to their businesses. They say that they intend to prove, under their allegations, that the alleged retail price-fixing conspiracy reduced consumer demand for beef, thereby derivatively reducing the retailers' and the packers' demand for the plaintiffs' fat cattle.

[10, 11] The appellants, however, lack standing to sue for such remote injury. Only those within the "target area" of an alleged antitrust conspiracy have standing to sue. *E.g., Jeffrey v. Southwestern Bell*, 5 Cir. 1975, 518 F.2d 1129, 1131. The question of standing is a preliminary one, to be answered from examination of the allegations of the complaint. *Yoder Bros., Inc. v. California-Florida Plant Corp.*, 5 Cir. 1976, 537 F.2d 1347, *cert. denied*, 429 U.S. 1094, 97 S.Ct. 1108, 51 L.Ed. 2d 540. Looking to the complaints, we find allegation of retail purchases in only the *Agee* and *Varian* complaints. In the other complaints we find, at best, allegations under which the plaintiffs could show harm flowing derivatively from a reduction in consumer demand. The "target" of a retail price-fixing conspiracy, however, is the retail purchaser. *E.g., Kemp Pontiac-Cadillac, Inc. v. Hartford Automobile Dealers' Ass'n*, 1974, D.Conn., 380 F.Supp. 1382, 1386. To recognize the non-purchasing plaintiffs as "targets" of the alleged retail price-

fixing conspiracy would be to grant antitrust standing to firms and persons at every level in the chain of beef production and distribution. "Congress did not intend the antitrust laws to provide a remedy in damages for all injuries that might conceivably be traced to an antitrust violation." *Hawaii v. Standard Oil Co.*, 1972, 405 U.S. 251, 263 n.14, 92 S.Ct. 885, 891-892, 31 L.Ed.2d 184. Only the *Varian* and *Agee* allegations satisfy the "target area" test for standing to sue.

Shifting ground, the appellants argue that evidence of the alleged retail price-fixing conspiracy is highly relevant to their claims of monopolization and monopsony or oligopsony price-fixing at the wholesale level. The defendants' retail-level activities, they urge, are evidence of the defendants' monopoly power and proclivity to collude. Evidence of those activities is also essential, they contend, to painting for the jury a complete picture of the alleged conspiracy and of the industry in which it operates. They contend, in short, that they simply pleaded evidence.

[12-15] This is not the place or time to debate the relevance of the retail price-fixing evidence. The district court had ample discretion, under Rule 12(f) of the Federal Rules of Civil Procedure, to order stricken from the complaint any redundant or immaterial matter. 5 C. Wright & A. Miller, *Federal Practice and Procedure* § 1382 at 807 (1969). Although unnecessary evidentiary details are usually not stricken from the complaint unless prejudicial or of no consequence to the controvery, *id.; see also Augustus v. Board of Public Instruction*, 5 Cir. 1962, 306 F.2d 862, evidence pleading, as distinguished from the pleading of ultimate facts, is not favored under the Federal Rules. *See* Rule 8(a) Fed.R. Civ.P.; 5 C. Wright and A. Miller, *supra*, at 832-33. Many courts have properly stricken unnecessary evidentiary detail from plead-

ings. *E.g., Control Data Corp. v. International Business Machines Corp.*, 8 Cir. 1970, 421 F.2d 323; *Commissioner of Internal Revenue v. Licavoli*, 6 Cir. 1958, 252 F.2d 268; *Mitchell v. Hart*, 1966, S.D.N.Y., 41 F.R.D. 138, 143. The district court's action will not be disturbed unless it was an abuse of discretion. *E.g., Commissioner of Internal Revenue v. Licavoli, supra*, at 272. We find here no abuse of discretion. Nor do we perceive how the plaintiffs have been harmed. The district court's order striking the pleadings does not control the issues of materiality and relevancy that govern admissibility of the evidence. *E. g., Control Data Corp. v. International Business Machines Corp., supra*, at 326-27. The plaintiffs need not plead these matters. *Schlick v. Penn-Dixie Cement Corp.*, 2 Cir. 1974, 507 F.2d 374, *cert. denied*, 421 U.S. 976, 95 S.Ct. 1976, 44 L.Ed.2d 467. "If the trial court considers these matters proper proof upon the trial, he may admit them even through not pleaded." *Alden-Rochelle, Inc. v. American Society of Composers, Authors and Publishers*, 1942, S.D.N.Y., 3 F.R.D. 157, 159.

V.

The plaintiffs in the *Pony Creek* action appeal the partial summary judgment entered against them on their claim that the defendants' fraudulent concealment of the alleged conspiracy tolled the four-year statute of limitations of section 4B of the Clayton Act. 15 U.S.C. § 15b.

[16, 17] The *Pony Creek* action was filed on June 5, 1975. Unless the statute of limitations was somehow tolled, the *Pony Creek* plaintiffs cannot recover for damages sustained prior to June 5, 1971. They allege in their complaint that they had failed to discover their cause of action before the June 1971 commencement of the limitations period because the defendants had fraudulently concealed it from them. Fraudulent con-

cealment tolls the Clayton Act's statute of limitations. *General Electric Co. v. City of San Antonio,* 5 Cir. 1964, 334 F.2d 480; *Rinzler v. Westinghouse Electric Corp.*, 5 Cir. 1964, 333 F.2d 719. To avail himself of this tolling doctrine, an antitrust plaintiff must show that the defendants concealed the conduct complained of, and that he failed, despite the exercise of due diligence on his part, to discover the facts that form the basis of his claim. *Charlotte Telecasters, Inc. v. Jefferson-Pilot Corp.*, 4 Cir. 1976, 546 F.2d 570; *Dayco Corp. v. Firestone Tire & Rubber Co.*, 6 Cir. 1975, 523 F.2d 389.

The defendant Kroger Co. ("Kroger") moved for partial summary judgment on the fraudulent concealment claim. Kroger submitted with its motion evidentiary matter that, it contended, conclusively established that the plaintiffs had known, or would have known through the exercise of due diligence, of the existence of their claims before June 5, 1971. The evidence consisted of copies of numerous articles and reports published in the late 1960's in newspapers and cattle industry trade journals, together with an affidavit attesting to the authenticity of the copies. The articles and reports publicized the dissatisfaction of livestock producers with cattle prices, as well as the charges of many cattlemen that the retail chains were colluding to depress prices. Many of the articles reported the filing, in 1968, of *Bray, et al. v. Safeway Stores, et al.*, N.D.Cal., 392 F.Supp. 851 (1975) a lawsuit brought by several California cattlemen against major retail chains and which involved allegations essentially identical to those of the *Pony Creek* complaint. The defendants' exhibits showed that the allegations of the *Bray* complaint had received much publicity nationwide. The plaintiffs filed no counter-affidavits. They argued that the *Bray* lawsuit revealed no operative facts relating to their claim and that none were revealed until dis-

covery in the *Bray* suit during 1973 disclosed that some of the defendants had indeed discussed prices at trade association meetings.

Finding no genuine issue of material fact, and mindful of the suggestion in part 1.80 of the *Manual for Complex Litigation* that issues such as fraudulent concealment be determined as early as possible in complex litigation, so as to define the scope of discovery,[26] the district court granted the motion.

The *Manual's* salutary principle notwithstanding, the question of when the statute of limitations began to run on the plaintiffs' cause of action is a factual one, *e.g., Ciccarone v. United States*, 3 Cir. 1973, 486 F.2d 253, 256, and is therefore not determinable on a motion for summary judgment. The district court's task was simply to determine whether a genuine question was presented justifying trial, F.R.Civ.P. 56(c), as the court fully recognized. The defendants, as the moving parties, had the burden of demonstrating the absence of any genuine material issue of fact, and the plaintiffs had no obligation to present evidence opposing the motion unless the defendants' affidavit and exhibits initially established the absence of a genuine issue. *Advisory Committee Notes to the 1963 Amendments to Rule* 56, 31 F.R.D. 647, 648; *Adickes*

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[26] Part 1.80 states in relevant part:

> In some complex cases it becomes apparent at the preliminary pretrial conference or shortly thereafter that the determination of a legal question will expedite the disposition of the cause. This is particularly the case where the nature and scope of discovery and further pretrial proceedings would be substantially affected by the determination of the preliminary legal question. For example, in the electrical equipment civil antitrust cases the question whether fraudulent concealment would toll the running of the statute of limitations was one of the most important questions. It was very desirable to secure a determination of this question as early as possible, for if the statute was not tolled by fraudulent concealment, the discovery would be comparatively narrow in scope of time and a summary judgment on some or all issues could be rendered in many cases.

Manual for Complex Litigation 80 (1977).

Kress, 1970, 398 U.S. 144, 90 S.Ct. 1598, 26 L.Ed.2d 142. Kroger's evidentiary showing went entirely to the issues of the plaintiffs' actual or constructive knowledge of their cause of action. The question presented, then, is whether Kroger's showing established the absence of a genuine issue as to the plaintiffs' knowledge, actual or constructive, of their claim.[27]

From the affidavit and exhibits it is abundantly clear that the plaintiffs knew or should have known in 1968 and 1969 of the allegations of the *Bray* complaint. The *Bray* case was widely publicized in numerous issues of numerous trade publications, including, as the district court noted, an issue of The American National Cattlemen's Association's weekly publication *Beef Business Bulletin*, which, according to the supporting affidavit, had at the relevant time a circulation of nearly 300,000. The *Bray* complaint itself was, of course, a matter of public record. It is of no moment that Kroger presented no direct evidence demonstrating that the plaintiffs were actually aware of the *Bray* case. Even assuming that the inferences of actual knowledge to be drawn from Kroger's presentation were insufficient for summary judgment purposes, the evidence was more than adequate to establish beyond doubt that reasonably diligent cattlemen in the plaintiffs' situation would have been aware, in the late 1960's, of the *Bray* allegations. Numerous federal courts have suggested that plaintiffs are chargeable with knowledge of the contents of public records. *E.g., Dayco Corp. v. Goodyear Tire & Rubber Co.*, 6 Cir. 1975, 523 F.2d 389, 394; *Morgan v. Koch*, 7 Cir. 1969, 419 F.2d 993, 998; *Overfield v. Pennroad Corp.*, 8 Cir. 1944, 146 F.2d

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[27] Kroger, of course, did not have to demonstrate the absence of triable fact issues as to the allegation that the defendants actively concealed the alleged conspiracy. If the defendants established that the plaintiffs knew or should have known of their cause of action before June 5, 1971, the running of the statute of limitations would not have been tolled even had the defendants affirmatively concealed the alleged scheme.

889, 898; *Pettibone v. Cook County*, 8 Cir. 1941, 120 F.2d 850, 855. In a case involving a claim that the statute of limitations has been tolled, "the means of knowledge are the same thing as knowledge itself." *Wood v. Carpenter*, 1879, 101 U.S. (11 Otto) 135, 143, 25 L.Ed. 807.

The plaintiffs' knowledge of the *Bray* complaint, however, is not *as a matter of law* tantamount to actual or constructive knowledge of their claim. Although the statute of limitations is not tolled simply because the plaintiffs lack much of the evidence supporting their potential claim, *Prather v. Neva Paperbacks, Inc.*, 5 Cir. 1971, 446 F.2d 338, they cannot have notice of a potential claim unless they are aware of some evidence tending to support it. The filing by others of a similar lawsuit against the same defendants may in some circumstances suffice to give notice, but to rule that it does so *as a matter of law* is to compel a person situated like these plaintiffs to file suit, on the pain of forfeiting his rights, regardless of whether his attorney believes that there is "good ground to support it." Rule 11, F.R.Civ.P. The mere filing of a similar lawsuit, without more, does not necessarily give "good ground" because that suit might well be frivolous or baseless.[28]

[18] The leap from the plaintiffs' knowledge of the *Bray* complaint to actual or constructive knowledge of their cause of action therefore involves factual issues. The defendants had the burden, as the moving parties, to demonstrate conclusively that the plaintiffs, through the exercise of reasonable diligence, would have discovered adequate ground for filing suit. The summary judgment evidence consisted only of a demonstration that the plaintiffs should have been aware of the *Bray* complaint. There is no evidence in the record suggest-

[28] That the *Bray* plaintiffs eventually succeeded (in 1975) in their lawsuit is of no consequence, for the *Bray* action might have disclosed nothing about the alleged conspiracy before June 5, 1971.

ing that the *Bray* litigation turned up any verification for the allegations before June 5, 1971, or that the plaintiffs had independent access before that time to any information, beyond the *Bray* complaint itself, that tended to verify their suspicions. At best, the materials on file might support an inference that the plaintiffs would have discovered adequate support before June 1971 had they been reasonably diligent. The inference, however, is not so compelling as to entitle the defendants to summary judgment. Because the defendants failed to demonstrate the absence of genuine issues of fact the partial summary judgment must be reversed.

We should emphasize that this ruling is dictated by the posture of the question and the nature of the defendants' summary judgment showing. The plaintiffs bear the ultimate burden of persuasion on the fraudulent concealment issue. The burden is a heavy one. Those who have learned of facts "calculated to excite inquiry" must inquire. *Clement A. Evans & Co. v. McAlpine*, 5 Cir. 1970, 434 F.2d 100, 102, *cert. denied*, 402 U.S. 988, 91 S.Ct. 1660, 29 L.Ed.2d 153. The widely publicized *Bray* complaint certainly put these plaintiffs to a duty to investigate. They must demonstrate to the trier of fact that they investigated with reasonable diligence and discovered nothing that would have justified them in filing suit before June 5, 1971. *Id.*; *see also Dayco Corp. v. Goodyear Tire & Rubber Co.*, *supra*. In opposing the motion for summary judgment, however, the plaintiffs were not required to make any showing unless the defendants demonstrated that no genuine issues of fact underlay the due diligence question. This the defendants failed to do.

* * *

The judgments below are REVERSED and the cases REMANDED for further proceedings consistent with this opinion.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NOS. 78-1817—78-1829
(Consolidated)

Dist. Ct. Nos. CA-3-75-0702-C, CA-3-76-1237 & 1238-C, CA-3-76-1244-C, CA-3-76-1248-C, CA-3-76-1253 & 1254-C, CA-3-76-1470-C, CA-3-77-0360 thru 0362-C

In re BEEF INDUSTRY ANTITRUST LITIGATION,
MDL DOCKET
No. 248.

PONY CREEK CATTLE CO., INC., et al.,
Plaintiffs-Appellants,
MUSSELMAN RANCH CO., etc., et al.,
Plaintiffs-Internevors-Appellants,

vs.

THE GREAT ATLANTIC & PACIFIC TEA CO. et al.,
Defendants-Appellees.

R. DIRK AGEE et al.,
Plaintiffs-Appellants,

vs.

SAFEWAY STORES, INC., et al.,
Defendants-Appellees.

MEAT PRICE INVESTIGATORS
ASSOCIATION, etc., et al.,
Plaintiffs-Appellants,

vs.

SAFEWAY STORES, INC., et al.,
Defendants-Appellees.

RICHARD S. LOWE et al.,
Plaintiffs-Appellants,
vs.
SAFEWAY STORES, INC., et al.,
Defendants-Appellees.
A. L. BLACK, et al.,
Plaintiffs-Appellants.
vs.
ALBERTSON'S, INC., et al.,
Defendants-Appellees (two cases).
CHAPARRAL CATTLE CORP., et al.,
Plaintiffs-Appellants,
vs.
SAFEWAY STORES, INC., et al.,
Defendants-Appellees.
BURKE PETERSEN et al.,
Plaintiffs-Appellants,
vs.
SAFEWAY STORES, INC., et al.,
Defendants-Appellees.
RONALD BECKER et al., on behalf of
themselves and all other persons
similarly situated,
Plaintiffs-Appellants,
vs.
SAFEWAY STORES, INC., et al.,
Defendants-Appellees.
JOHN O. VARIAN et al.,
Plaintiffs-Appellants,
vs.
SAFEWAY STORES, INC., et al.,
Defendants-Appellees.

MEAT PRICE INVESTIGATORS
ASSOCIATION et al.,
Plaintiffs-Appellants,
vs.
SAFEWAY STORES, INC., etc., et al.,
Defendants-Appellees.
LITTLE RANCH CO., INC., et al.,
Plaintiffs-Appellants,
vs.
THE NATIONAL ASSOCIATION OF
FOOD CHAINS, etc., et al.,
Defendants-Appellees.

RONALD BECKER, et al., on behalf of themselves and all other persons similarly situated,
Plaintiffs-Appellants,
vs.
SAFEWAY STORES, INC., etc., et al.,
Defendants-Appellees.

Nos. 78-1817—78-1829.
Aug. 17, 1979

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS

Before WIDSOM, HILL and FAY, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Louisiana, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgments of the said District Court in this cause be, and the same are hereby, REVERSED and the cases REMANDED for further proceedings consistent with this Court's opinion;

It is further ordered that defendants-appellees pay to plaintiffs-appellants, BLACK, ET. AL., MEAT PRICE INVESTIGATORS ASSOCIATIONS. ET. AL., and BECKER, ET. AL., VARIAN, ET. AL., CHAPARRAL CATTLE CORP., ET. AL. and PETERSEN, ET. AL., LITTLE RANCH CO., LOWE, ET. AL., and PONY CREEK, ET. AL., the costs on appeal to be taxed by the Clerk of this Court.

August 17, 1979

ISSUED AS MANDATE:

UNITED STATES COURT OF APPEALS
OFFICE OF THE CLERK
FIFTH CIRCUIT
GILBERT F. GANUCHEAU
Clerk
April 24, 1980
Tel. 504-589-6514
600 Camp Street
New Orleans, LA 70130

To All Parties Listed Below:

Nos. 78-1817—78-1829—In Re BEEF INDUSTRY ANTITRUST LITIGATION, MDL DOCKET NO. 248

Dear Counsel:

This is to advise that an order has this day been entered denying the petition ( ) for rehearing, and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active

service not having voted in favor of it, (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the petition ( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,
GILBERT F. GANUCHEA
Clerk
By SALLY HAYWARD
Deputy Clerk

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
OFFICE OF THE CLERK
Gilbert F. Ganucheau, Clerk
May 9, 1980
Tel. 504-589-6514
600 Camp Street
New Orleans, LA 70130

Mr. John A. Cochrane
Attorney at Law
Suite 500, 360 Wabasha Street
St. Paul, Minnesota 55102

No. 78-1817 (Consolidated) MDL 248 Beef Industry Antitrust Litigation

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Mandate stayed to and including June 8, 1980

Dear Counsel:

The court has this day granted a stay of the issuance of the mandate to the date as shown above. If during the period of the stay there is filed with the clerk of this court a notice from

the clerk of the Supreme Court that the party who has obtained the stay has filed a petition for the writ in that court, the stay shall continue until final disposition by the Supreme Court. Upon the filing of a copy of an order of the Supreme Court denying the petition for writ of certiorari, the mandate will issue immediately under Rule 41, FRAP.

Under revised Rule 21(1) of the Supreme Court effective July 1, 1970, a record is no longer required in connection with an application for writ of certiorari, and therefore will not be routinely prepared by this office (38LW 3502).

A copy of the opinion, if any, judgment, or Rule 21 decision, and the denial of rehearing are still required by the Supreme Court to be incorporated as an appendix to your petition. Enclosed are copies of the said documents which have been entered in this cause.

Very truly yours,
GILBERT F. GANUCHEAU
Clerk
LINDA ST. PIERRE
Deputy Clerk

/bh
enc.
cc: All Lead Counsel

IN THE UNITED STATE COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 78-1817, et al.

Filed June 13, 1980
Gilbert F. Ganucheau, Clerk
MDL 248
BEEF INDUSTRY ANTITRUST LITIGATION
(Retail Cases).

Appeals from the United States District Court for the Northern District of Texas

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ORDER:

( ) The motions of ———————— for stay of the issuance of the mandate pending petition for writ of certiorari is DENIED.

( ) The motions of ———————— for stay of the issuance of the mandate pending petition for writ of certiorari is GRANTED to and including ————, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the period above mentioned there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition has been filed. The Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of the stay granted herein, unless the

above mentioned certificate shall be filed with the Clerk of this Court within that time.

(x) The motions of LOWE, ET AL. and A.L. BLACK, ET AL. for a further stay of the issuance of the mandate is GRANTED to and including July 9, 1980, under the same conditions as set forth in the preceding paragraph.

( ) IT IS ORDERED that the motions of _____ for a further stay of the issuance of the mandate is DENIED.

/s/ JAMES C. HILL
United States Circuit Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

In Re:
BEEF INDUSTRY ANTITRUST LITIGATION

MDL Docket No. 248
This Matter Relates to:
CA 3-75-0702-C (Pony Creek)
CA 3-76-1237-C (Agee)
CA 3-76-1238-C (MPIA)
CA 3-76-1244-C (Lowe)
CA 3-76-1248-C (Black)
CA 3-76-1253-C (Chaparral)
CA3-76-1254-C (Petersen)
CA 3-76-1255-C (Boccardo)
CA 3-76-1361-C (Becker)
CA 3-76-1470-C (Varian)
CA 3-77-0360-C (Becker-DC)
CA 3-77-0361-C (MPIA-DC)

ORDER

The Court in its letter of October 19, 1977, informed the parties in the above causes that it would strike the retail price fixing allegations of the plaintiffs and dismiss plaintiffs' complaints on the basis of *Illinois Brick Co. v. Illinois*, —— U.S. ——, 97 S.Ct. 2061, 52 L.Ed 2d 707 (1977), *rehearing denied*, 46 U.S.L.W. 3220 (U.S., Oct. 3, 1977) (No. 76-404).

It is therefore ORDERED that the allegations listed in Appendix A to this Order are dismissed and stricken from such complaints.

It is further ORDERED that CA 3-76-1238-C, CA 3-76-1254-C, and CA 3-76-1361-C, upon the motions of the defendants, are dismissed with prejudice for failure to state a claim upon which relief can be granted.

It is further ORDERED that upon the Court's own motion that CA 3-75-0702-C, CA 3-76-1237-C, CA 3-76-1244-C, CA 3-76-1248-C, CA 3-76-1253-C, CA 3-76-1255-C, CA 3-76-1470-C, CA 3-77-0360-C and CA 3-77-0361-C are dismissed with prejudice for failure to state a claim upon which relief can be granted.

United States District Judge

Dec. 9, 1977

APPENDIX A

PLAINTIFFS' RETAIL PRICE-FIXING ALLOCATIONS

Petersen (CA 3-76-1254-C)

Amended Complaint, Section IV, Paragraph 2(b)-(d)

Pony Creek (CA 3-75-0702-C)

Third Amended Complaint, Paragraph 12(b)

MPIA (CA 3-76-1238-C)

Amended and Substituted Complaint, Paragraphs 34 (c)-(e) and 37(b)-(c)

Agee (CA 3-76-1237-C)

Amended Complaint, Section IV, Paragraphs 2(b)-(d)

Black (CA 3-76-1238-C)

Amended Complaint, Paragraphs 42b, 45b(2), 45b(4), 52, 72 and 74

Chaparral (CA 3-76-1253-C)

Complaint, Section V, Paragraphs 2(b) and 2(d)

Boccardo (CA 3-76-1255-C)

Amended Complaint, Paragraphs 57(b) and 57(d)

Becker (CA 3-76-1261-C)
Amended and Substituted Complaint, Paragraphs 34(c)-(e) and 37(b)-(c)
Varian (CA 3-76-1470-C)
Complaint, Section III, Paragraphs 15 and 24; and Section V, Paragraphs 2(b), 2(d) and 3
Becker-DC (CA 3-77-0360-C)
Complaint, Paragraph 25(b)
MPIA-DC (CA 3-77-0361-C)
Complaint, Paragraph 23(b)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

In re: BEEF INDUSTRY ANTITRUST LITIGATION

MDL Docket No. 248
This Matter Relates to:
CA 3-75-0702-C (Pony Creek)
CA 3-76-1237-C (Agee)
CA 3-76-1238-C (MPIA)
CA 3-76-1244-C (Lowe)
CA 3-76-1248-C (Black)
CA 3-76-1253-C (Chaparral)
CA 3-76-1254-C (Petersen)
CA 3-76-1255-C (Boccardo)
CA 3-76-1361-C (Becker)
CA 3-76-1470-C (Varian)
CA 3-77-0360-C (Becker-DC)
CA 3-77-0361-C (MPIA-DC)

JUDGMENT

This action came on for hearing before the Court, Honorable W. M. Taylor, Jr., District Judge, presiding, and the issues having been duly heard and a decision having been duly rendered,

It is ORDERED, ADJUDGED and DECREED that CA 3-76-1238-C, CA 3-76-1254-C, and CA 3-76-1361-C, upon the motions of the defendants, are dismissed with prejudice for failure to state a claim upon which relief can be granted.

It is further ORDERED, ADJUDGED and DECREED that upon the Court's own motion that CA 3-75-0702-C, CA 3-76-1237-C, CA 3-76-1244-C, CA 3-76-1248-C, CA 3-76-1253-C, CA 3-76-1255-C, CA 3-76-1470-C, CA 3-77-0360-C and CA 3-77-0361-C are dismissed with prejudice for failure to state a claim upon which relief can be granted.

ORDERED entered the 9th day of December, 1977, this 27th day of December, 1977.

W. M. TAYOR, Jr.
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

In Re Beef Industry
Antitrust Litigation

MDL Docket No. 284
This Matter Relates to:
No. CA 3-75-0702-C (Pony Creek)
No. CA 3-76-1238-C (MPIA)
No. CA 3-76-1248-C (Black)
No. CA 3-76-1255-C (Boccardo)
No. CA 3-76-1361-C (Becker)
No. CA 3-77-0360-C (Becker-DC)
No. CA 3-77-0361-C (MPIA-DC)
No. CA 3-77-0362-C (Little Ranch)

ORDER

Plaintiffs in the above-referenced actions have filed or joined in various motions in response to this Court's Order of December 9, 1977, which dismissed these and other cases with prejudice on the basis of *Illinois Brick Co. v. Illinois*, 97 S. Ct. 2061 (1977), *rehearing denied*, 46 U.S.L.W. 3220 (U.S. Oct. 3, 1977). Each of these motions seeks reconsideration of this Court's Order and/or seeks leave to file post-dismissal amendments to the complaints in these actions. The Court having considered each of plaintiffs' motions, as well as defendants' joint response thereto, and the Court being of the opinion that dismissal of these cases with prejudice is appropriate under *Illinois Brick Co. v. Illinois, supra*, and that justice does not require leave to file amended pleadings in the present circumstances,

IT IS THEREFORE ORDERED that each of the motions listed in Appendix A to this Order should be, and hereby are, denied.

SIGNED AND ENTERED this 24th day of Jan., 1978.

United States District Judge

APPENDIX A

1. *A. L. Black, et al. v. Albertson's, Inc., et al.*, Docket No. CA 3-76-1248-C: Motion for Leave to File Second Amended and Substituted Complaint; Also, Joinder (by letter dated December 23, 1977) and Motions for Reconsideration identified in Items 3, 4 and 5 below.

2. *James F. Boccardo, et al. v. Safeway Stores, Inc., et al.*, Docket No. CA 3-76-1255-C: Motion for Leave to Amend the First Amended Complaint.

3. *Little Ranch Co., Inc., et al. v. The National Association of Food Chains, et al.*, Docket No. CA 3-77-0362-C: Motion for Reconsideration.

4. *Pony Creek Cattle Co., Inc., et al. and Musselman Ranch Co. and Powell Cattle Co. v. The Great Atlantic & Pacific Tea Co.*, Docket No. CA 3-76-0702-C: Motion for Reconsideration/ Motion for New Trial; Motion to Alter or Amend An Order and For Relief From Order; and Motion for Leave to File Amended Complaints

5. CA 3-76-1238-C (MPIA); CA 3-76-1361-C (Becker); CA 3-77-0360-C (Becker-DC); CA 3-77-0361-C- (MPIA-DC): Motion for Reconsideration, Pursuant to F.R.C.P. 59.

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF TEXAS
AMARILLO DIVISION

CIVIL ACTION
CA-2-75-186

A. L. BLACK; MRS. LILA M. BUSKE, Surviving Wife of G. B. BUSKE, As Independent Executrix and Trustee Under the Last Will and Testament of G. B. BUSKE, Deceased, Dated December 12, 1973, and of the Estate of G. B. BUSKE, Deceased: PIONEER CATTLE ORDER BUYERS, INC., A Texas Corporation; HEREFORD FEED YARDS, INC., A Texas Corporation; SOLANA CORPORATION, A Texas Corporation; PROCHEMCO CATTLE COMPANY, INC., A Texas Corporation; and, EUREKA CATTLE COMPANY, INC., A Texas Corporation,

Plaintiffs,

vs.

ACME MARKETS, INC.; ALBERTSON'S, INC., ALLIED SUPER MARKETS, INC.; AMERICAN STORES COMPANY; ARDEN MAYFAIR, INC.; BORMAN'S INC.; CIRCLE K CORPORATION; COLONIAL STORES, INC.; FIRST NATIONAL STORES, INC.; FOOD FAIR STORES, INC.; THE GRAND UNION COMPANY; JEWEL COMPANIES, INC.; LUCKY STORES, INC.; THE NATIONAL PROVISIONER, INC.; NATIONAL TEA COMPANY; PENN FRUIT COMPANY; PUEBLO INTERNATIONAL, INC.; SKAGGS COMPANIES, INC.; SUPER MARKETS GENERAL CORPORATION; SUPER VALUE STORES, INC.; THRIFTIMART, INC.; WINN-DIXIE STORES, INC.; and NATIONAL ASSOCIATION OF FOOD CHAINS, An

Association Comprised of the Above and Foregoing Named Defendants, as well as Other Retail Stores as its Members, Defendants.

FIRST AMENDMENT
RULE 15—FEDERAL RULES OF CIVIL PROCEDURE
AMENDED COMPLAINT FOR DAMAGES AND
INJUNCTIVE RELIEF UNDER THE SHERMAN AND
CLAYTON ANTITRUST ACTS
(JURY DEMANDED)

The above named Plaintiffs, and each of them, bring this action to obtain damages from, and equitable relief against, the above named Defendants, and demanding trial by jury, complain as follows:

I

JURISDICTION AND VENUE

1. This complaint is filed and this action is instituted against the above named Defendants, under Sections 4 and 16 of the Clayton Act (15 U.S.C. 15, 26) in order to secure damages from, and equitable relief against the Defendants and to redress, prevent and restrain violations by the Defendants, as hereinafter alleged, of Sections 1 and 2 of the Sherman Act (15 U.S.C. 1, 2).

2. Each of the Defendants either maintains an office or transacts business and is found within the Northern District of Texas, or in acting together in the manner hereinafter alleged are within the jurisdiction of this Court for the purposes of service. Many of the unlawful acts done in violation of the antitrust laws, herein alleged, have been performed within the Northern District of Texas, or in acting together, one or more have performed unlawful acts in combination with each

other in violation of the antitrust laws as herein alleged, which have been performed within the Northern District of Texas.

3. The Defendants have acted together and for and on behalf of and as agents and representatives of each other in all matters set forth.

II
THE PARTIES

4. The Plaintiffs are each producers and feeders of cattle, each doing business in the Panhandle of the State of Texas in the Northern District of Texas; and as such producers and feeders of cattle, are engaged in the business of feeding, fattening and selling cattle ready for slaughter, to be slaughtered and to be received, transported and sold by the chain stores in the United States, including the Defendants herein. Also, several Plaintiffs produce cattle; that is, have owned ranches and cows and have grown and produced calves which ultimately were fattened and slaughtered and sold as stated for ultimate consumer consumption as dressed meat.

5. Plaintiff A. L. BLACK, a producer and feeder of cattle, a sole proprietor, with his principal place of business located in Friona, Parmer County, Texas, is engaged in the business of raising and selling cattle.

6. Plaintiff G. B. BUSKE, a producer and feeder of cattle, a sole proprietor, with his principal place of business located in Friona, Parmer County, Texas, was engaged in the business of raising and selling cattle. He died testate on March 7, 1976. His Executor and Trustee represents his estate.

7. Plaintiff PIONEER CATTLE ORDER BUYERS, INC., a Texas Corporation, a producer and feeder of cattle, with its principal place of business located in Friona, Parmer

County, Texas, is engaged in the business of raising and selling cattle.

8. Plaintiff HEREFORD FEED YARDS, INC., A Texas Corporation, a producer and feeder of cattle, with its principal place of business located in Hereford, Deaf Smith County, Texas, is engaged in the business of raising and selling cattle.

9. Plaintiff SOLANA CORPORATION, a Texas Corporation, a producer and feeder of cattle, with its principal place of business located in Amarillo, Potter County, Texas, is engaged in the business of raising and selling cattle.

10. Plaintiff PROCHEMCO CATTLE COMPANY, INC., a Texas Corporation, a producer and feeder of cattle, with its principal place of business located in Amarillo, Potter County, Texas, is engaged in the business of raising and selling cattle.

11. Plaintiff EUREKA CATTLE COMPANY, Inc., a Texas Corporation, a producer and feeder of cattle, with its principal place of business located in Hereford, Deaf Smith County, Texas, is engaged in the business of raising and selling cattle.

12. The Defendants are each engaged in Interstate Commerce, each acquiring meat from cattle grown, raised, fattened, butchered and transported throughout the country, and in transporting and selling meat to consumers.

13. Defendant ACME MARKETS, INC. is a corporation incorporated under the laws of the State of Delaware and having its principal place of business at 124 North 15th Street, Philadelphia, Pa. 19102. Defendant ACME MARKETS, INC. is a member of the National Association of Food Chains and, as a retail grocer throughout the country, acquires meat for its retail outlets by the purchase of cattle grown, fed, fattened,

butchered or slaughtered within the Northern District of Texas. Defendant ACME MARKETS, INC. engaged in the sale, purchase or distribution of fresh, frozen or processed meat and meat products derived from the Northern District of Texas, and this cause of action grows out of such sale, purchase or distribution of meat and meat products. Defendant does not have a Registered Agent for Service, but by virtue of transacting business within the State of Texas, as described above, service of process may be had upon said corporation by serving the Secretary of the State of Texas, pursuant to Article 2031b of the Revised Civil Statutes of Texas and Rule 4 of the Federal Rules of Civil Procedure.

14. Defendant ALBERTSON'S, INC. is a Nevada Corporation, with its principal place of business in Boise, Idaho. ALBERTSON'S INC. operates more than 300 stores in seventeen western states, and further participates in a food product joint venture through its wholly owned subsidiary, Texas-Albertson's, Inc., with Defendant Skagg Companies, Inc., known as Mountain States Wholesale Company. ALBERTSON'S, INC. retail food stores sell meat products, including beef, in aid of their retail operations and purchase the same in interstate commerce.

15. Defendant ALLIED SUPER MARKETS, INC. is a corporation incorporated under the laws of the State of Delaware, and having its principal place of business at 8711 Meadowdale One, Detroit Michigan, 48228. Defendant ALLIED SUPER MARKETS, INC. is a member of the National Association of Food Chains and as a retail grocer throughout the country, acquires meat for its retail outlets by the purchase of cattle grown, fed, fattened, butchered or slaughtered within the Northern District of Texas. Defendant ALLIED SUPER MARKETS, INC. engaged in the sale, purchase, or

distribution of fresh, frozen, or processed meat and meat products derived from the Northern District of Texas, and this cause of action grows out of such sale, purchase or distribution of meat and meat products. Defendant ALLIED SUPER MARKETS, INC. Registered Agent for Service of process in the State of Texas is C. T. Corporation, Republic National Bank Building, Dallas, Texas, whereupon service of process may be had.

16. Defendant AMERICAN STORES COMPANY is a Delaware Corporation, with its principal place of business located in Wilmington, Delaware. AMERICAN STORES COMPANY and its subsidiaries operate a chain of more than 700 retail food stores in nine states, selling meat products, including beef. In support of its retail business, AMERICAN STORES COMPANY operates three meat packing plants.

17. Defendant ARDEN-MAYFAIR, INC. is a corporation incorporated under the laws of the State of Delaware and having its principal place of business at 2500 South Garfield Avenue, Los Angeles, California, 90054. Defendant ARDEN-MAYFAIR, INC. is a member of the National Association of Food Chains and as a retail grocer throughout the country, acquires meat for its retail outlets by the purchase of cattle grown, fed, fattened, butchered or slaughtered within the Northern District of Texas. Defendant ARDEN-MAYFAIR, ING. engaged in the sale, purchase or distribution of fresh, frozen or processed meat and meat products derived from the Northern District of Texas, and this cause of action grows out of such sale, purchase or distribution of meat and meat products. Defendant does not have a Registered Agent for Service, but by virtue of transacting business within the State of Texas, as described above, service of process may be had upon said corporation by serving the Secretary of the State of Texas,

pursuant to Article 2031b of the Revised Civil Statutes of Texas and Rule 4 of the Federal Rules of Civil Procedure.

18. Defendant P. BORMAN, INC. is a corporation incorporated under the laws of the State of Delaware and having its principal place of business at P. O. Box 446, Detroit, Michigan, 48232. Defendant P. BORMAN, INC. is a member of the National Association of Food Chains and as a retail grocer throughout the country acquires meat for its retail outlets by the purchase of cattle grown, fed, fattened, butchered or slaughtered within the Northern District of Texas. Defendant P. BORMAN, INC. engaged in the sale, purchase or distribution of fresh, frozen or processed meat and meat products derived from the Northern District of Texas, and this cause of action grows out of such sale, purchase or distribution of meat and meat products. Defendant does not have a Registered Agent for Service but by virtue of transacting business within the State of Texas, as described above, service of process may be had upon said corporation by serving the Secretary of the State of Texas, pursuant to Article 2031b of the Revised Civil Statutes of Texas and Rule 4 of the Federal Rules of Civil Procedure.

19. Defendant CIRCLE K CORPORATION is a Texas Corporation, with its principal place of business in Phoenix, Arizona. Defendant CIRCLE K CORPORATION operates over 1,000 retail food stores in the western United States, and these stores sell meat products, including beef, in aid of their retail store operations, and purchase the same in interstate commerce.

20. Defendant COLONIAL STORES, INC., is a corporation incorporated under the laws of the State of Virginia and having its principal place of business at 2251 North Sylvan Road, Atlanta, Georgia, 30302. Defendant COLONIAL

STORES, INC. is a member of the National Association of Food Chains and as a retail grocer throughout the country, acquires meat for its retail outlets by the purchase of cattle grown, fed, fattened, butchered or slaughtered within the Northern District of Texas. Defendant COLONIAL STORES, INC. engaged in the sale, purchase or distribution of fresh, frozen or processed meat and meat products derived from the Northern District of Texas, and this cause of action grows out of such sale, purchase or distribution of meat and meat products. Defendant COLONIAL STORES, INC. Registered Agent for Service of process in the State of Texas is T. D. Murphy, Jr., 420 North Lincoln, Odessa, Texas, whereupon service of process may be had.

21. Defendant FIRST NATIONAL STORES, INC. is a corporation incorporated under the laws of the State of Massachusetts and having its principal place of business at 5 Middlesex Avenue, Somerville, Massachusetts, 02143. Defendant FIRST NATIONAL STORES, INC. is a member of the National Association of Food Chains, and as a retail grocer throughout the country, acquires meat for its retail outlets by the purchase of cattle grown, fed, fattened, butchered or slaughtered within the Northern District of Texas. Defendant FIRST NATIONAL STORES, INC. engaged in the sale, purchase or distribution of fresh, frozen or processed meat and meat products derived from the Northern District of Texas, and this cause of action grows out of such sale, purchase or distribution of meat and meat products. Defendant FIRST NATIONAL STORES, INC. does not have a Registered Agent for Service, but by virtue of transacting business within the State of Texas, as described above, service of process may be had upon said corporation by serving the Secretary of the State of Texas pursuant to Article 2031b of the Revised Civil

Statutes of Texas and Rule 4 of the Federal Rules of Civil Procedure.

22. Defendant FOOD FAIR STORES, INC. is a corporation incorporated under the laws of the State of Pennsylvania and having its principal place of business at 3175 John F. Kennedy Boulevard, Philadelphia, Pennsylvania, 19101. Defendant FOOD FAIR is a member of the National Association of Food Chains and as a retail grocer throughout the country, acquires meat for its retail outlets by the purchase of cattle grown, fed, fattened, butchered or slaughtered within the Northern District of Texas. Defendant FOOD FAIR STORES, INC. engaged in the sale, purchase, or distribution of fresh, frozen or processed meat and meat products derived from the Northern District of Texas, and this cause of action grows out of such sale, purchase or distribution of meat and meat products. Defendant FOOD FAIR STORES, INC. does not have a Registered Agent for Service, but by virtue of transacting business within the State of Texas, as described above, service of process may be had upon said corporation by serving the Secretary of the State of Texas pursuant to Article 2031b of the Revised Civil Statutes of Texas and Rule 4 of the Federal Rules of Civil Procedure.

23. Defendant GRAND UNION COMPANY is a corporation incorporated under the laws of the State of Delaware and having its principal place of business at 100 Broadway, East Patterson, New Jersey, 07407. Defendant GRAND UNION COMPANY is a member of the National Association of Food Chains and as a retail grocer throughout the country, acquires meat for its retail outlets by the purchase of cattle grown, fed, fattened, butchered or slaughtered within the Northern District of Texas. Defendant GRAND UNION COMPANY engaged in the sale, purchase or distribution of

fresh, frozen or processed meat and meat products derived from the Northern District of Texas, and this cause of action grows out of such sale, purchase or distribution of meat and meat products. Defendant GRAND UNION COMPANY does not have a Registered Agent for Service, but by virtue of transacting business within the State of Texas, as described above, service of process may be had upon said corporation by serving the Secretary of the State of Texas, pursuant to Article 2031b of the Revised Civil Statutes of Texas and Rule 4 of the Federal Rules of Civil Procedure.

24. Defendant JEWEL COMPANIES, INC. is a corporation incorporated under the laws of the State of New York and having its principal place of business at 1955 West North Avenue, Melrose Park, Illinois, 60160. Defendant JEWEL COMPANIES, INC. is a member of the National Association of Food Chains and as a retail grocer throughout the country, acquires meat for its retail outlets by the purchase of cattle grown, fed, fattened, butchered or slaughtered within the Northern District of Texas. Defendant JEWEL COMPANIES, INC. engaged in the sale, purchase or distribution of fresh, frozen or processed meat and meat products derived from the Northern District of Texas, and this cause of action grows out of such sale, purchase or distribution of meat and meat products. Defendant JEWEL COMPANIES, INC. Registered Agent for Service of process in the State of Texas is C. T. Corporation, Dallas, whereupon service of process may be had.

25. Defendant LUCKY STORES, INC. is a corporation incorporated under the laws of the State of California and having its principal place of business at 1701 Marian Boulevard, San Leandro, California, 94577. Defendant LUCKY STORES, INC. is a member of the National Association of

Food Chains and as a retail grocer throughout the country, acquires meat for its retail outlets by the purchase of cattle grown, fed, fattened, butchered or slaughtered within the Northern District of Texas. Defendant LUCKY STORES, INC. engaged in the sale, purchase or distribution of fresh, frozen or processed meat and meat products derived from the Northern District of Texas, and this cause of action grows out of such sale, purchase or distribution of meat and meat products. Defendant LUCKY STORES, INC. Registered Agent for Service of process in the State of Texas is C. T. Corporation, Dallas, Texas, whereupon service of process may be had.

26. Defendant NATIONAL PROVISIONER, INC. is a New York Corporation, located in Chicago, Illinois, NATIONAL PROVISIONER, INC. publishes market advisory services, including the "yellow sheet", a publication listing the prices of beef during various time periods.

27. Defendant NATIONAL TEA COMPANY is a corporation incorporated under the laws of the State of Illinois and having its principal place of business at 1000 North Crosby Street, Chicago, Illinois, 60610. Defendant NATIONAL TEA COMPANY is a member of the National Association of Food Chains and as a retail grocer throughout the country, acquires meat for its retail outlets by the purchase of cattle grown, fed, fattened, butchered or slaughtered within the Northern District of Texas. Defendant NATIONAL TEA COMPANY engaged in the sale, purchase or distribution of fresh, frozen or processed meat and meat products derived from the Northern District of Texas, and this cause of action grows out of such sale, purchase or distribution of meat and meat products. Defendant's Registered Agent for Service of process in the State of Texas, is C. T. Corporation, 811 Dallas

Avenue, Houston, Texas, whereupon service of process may be had.

28. Defendant PENN FRUIT COMPANY is a corporation incorporated under the laws of the State of Delaware and having its principal place of business at Grant Avenue and Blue Grass Road, Philadelphia, Pennsylvania, 19115. Defendant PENN FRUIT COMPANY is a member of the National Association of Food Chains and as a retail grocer throughout the country, acquires meat for its retail outlets by the purchase of cattle grown, fed, fattened, butchered or slaughtered within the Northern District of Texas. Defendant PENN FRUIT COMPANY engaged in the sale, purchase or distribution of fresh, frozen or processed meat and meat products derived from the Northern District of Texas, and this cause of action grows out of such sale, purchase or distribution of meat and meat products. Defendant PENN FRUIT COMPANY does not have a Registered Agent for Service, but by virtue of transacting business within the State of Texas, as described above, service of process may be had upon said corporation by serving the Secretary of State of Texas, pursuant to Article 2031b of the Revised Civil Statutes of Texas and Rule 4 of the Federal Rules of Civil Procedure.

29. Defendant PUEBLO INTERNATIONAL, INC. is a corporation incorporated under the laws of the State of Delaware and having its principal place of business at 375 Park Avenue, New York, New York, 10017. Defendant PUEBLO INTERNATIONAL, INC. is a member of the National Association of Food Chains and as a retail grocer throughout the country, acquires meat for its retail outlets by the purchase of cattle grown, fed, fattened, butchered or slaughtered within the Northern District of Texas. Defendant PUEBLO INTERNATIONAL, INC. engaged in the sale, purchase or dis-

tribution of fresh, frozen or processed meat and meat products derived from the Northern District of Texas, and this cause of action grows out of such sale, purchase or distribution of meat and meat products. Defendant PUEBLO INTERNATIONAL, INC. does not have a Registered Agent for Service, but by virtue of transacting business within the State of Texas, as described above, service of process may be had upon said corporation by serving the Secretary of the State of Texas, pursuant to Article 2031b of the Revised Civil Statutes of Texas and Rule 4 of the Federal Rules of Civil Procedure.

30. Defendant SKAGGS COMPANIES, INC. is a Delaware Corporation, with its principal place of business in South Salt Lake City, Utah. SKAGGS COMPANIES, INC. operates a chain of retail self-service drug stores in the Midwestern and Intermountain areas of the United States; its retail food stores sell meat products, including beef. SKAGGS COMPANIES, INC. further participates in a joint venture through its wholly-owned subsidiary Texas-Skaggs, Inc. with Defendant Albertson's, Inc., which operates grocery-drug supermarkets in Texas, Oklahoma, Florida, Louisiana and Arkansas.

31. Defendant SUPER MARKETS GENERAL CORPORATION is a corporation incorporated under the laws of the State of Delaware and having its principal place of business at 301 Blair Road, Woodbridge, New Jersey, 07095. Defendant is a member of the National Association of Food Chains and as a retail grocer throughout the country, acquires meat for its retail outlets by the purchase of cattle grown, fed, fattened, butchered or slaughtered within the Northern District of Texas. Defendant SUPER MARKETS GENERAL CORPORATION engaged in the sale, purchase or distribution of fresh, frozen or processed meat and meat products derived from the Northern District of Texas, and this cause of ac-

tion grows out of such sale, purchase or distribution of meat and meat products. Defendant does not have a Registered Agent for Service, but by virtue of transacting business within the State of Texas, as described above, service of process may be had upon said corporation by serving the Secretary of the State of Texas, pursuant to Article 2031b of the Revised Civil Statutes of Texas and Rule 4 of the Federal Rules of Civil Procedure.

32. Defendant SUPER VALUE STORES, INC. is a corporation incorporated under the laws of the State of Delaware and having its principal place of business at 101 Jefferson Avenue, Hopkins, Minnesota, 55343. Defendant SUPER VALUE STORES, INC. is a member of the National Association of Food Chains and as a retail grocer throughout the country, acquires meat for its retail outlets by the purchase of cattle grown, fed, fattened, butchered or slaughtered within the Northern District of Texas. Defendant engaged in the sale, purchase or distribution of fresh, frozen or processed meat and meat products derived from the Northern District of Texas, and this cause of action grows out of such sale, purchase or distribution of meat and meat products. Defendant SUPER VALUE STORE, INC. does not have a Registered Agent for Service, but by virtue of transacting business within the State of Texas, as described above, service of process may be had upon said corporation by serving the Secretary of the State of Texas, pursuant to Article 2031b of the Revised Civil Statutes of Texas and Rule 4 of the Federal Rules of Civil Procedure.

33. Defendant THRIFTIMART, INC. is a California corporation, with its principal place of business in Los Angeles, California. THRIFTIMART, INC. operates more than 60 retail supermarkets in Southern California and Nevada, which

sell meat products, including beef. THRIFTIMART, INC. also operates a meat storage and distribution plant.

34. Defendant WINN-DIXIE STORES, INC. is a corporation incorporated under the laws of the State of Florida and having its principal place of business at 5050 Edgewood Court, Jacksonville, Florida, 32200. Defendant WINN-DIXIE STORES, INC. is a member of the National Association of Food Chains and as a retail grocer throughout the country, acquires meat for its retail outlets by the purchase of cattle grown, fed, fattened, butchered or slaughtered within the Northern District of Texas. Defendant WINN-DIXIE STORES, INC. engaged in the sale, purchase or distribution of fresh, frozen or processed meat and meat products derived from the Northern District of Texas, and this cause of action grows out of such sale, purchase or distribution of meat and meat products. Defendant does not have a Registered Agent for Service, but by virtue of transacting business within the State of Texas, as described above, service of process may be had upon said corporation by serving the Secretary of State of Texas, pursuant to Article 2031b of the Revised Civil Statutes of Texas and Rule 4 of the Federal Rules of Civil Procedure.

35. The National Association of Food Chains, an association comprised of the above and foregoing named Defendants, as well as other retail stores as its members, is named as Party Defendant. The above named twenty-two (22) Defendants, all of whom are made parties hereto, individually, and as representatives of the class of members of the National Association of Food Chains; and the above named Defendants are representatives of all such other Defendants and of such class, in that all of the members of the National Association of Food Chains have acted together in each and all of the matters here-

in complained of, and in violation of Sections 1 and 2 of the Sherman Antitrust Act (15 U.S.C. 1, 2).

III

CO-CONSPIRATORS

36. Various other companies and individuals not named Defendants in this complaint, participated as co-conspirators in the offenses charged herein and performed acts and made statements in furtherance thereof, and are made Parties hereto as Class Defendants.

37. Plaintiffs retain the right to specifically name each and all of such additional Chain Stores, as handlers of meat products, as members of and belonging to the National Association of Food Chains, upon discovery and determination of the true and correct legal name of such Parties.

IV

NATURE OF TRADE AND COMMERCE

38. Livestock, such as that bought and sold by Plaintiffs, including cattle, sheep and hogs, is raised on farms and ranches and thereafter sold and placed into a channel of distribution, which ultimately results in it reaching domestic consumers in the form of fresh, frozen or processed meat products. The initial step in the chain of distribution involves the sale by the livestock producer to one or more of four separate marketing channels, to-wit: feedlots, auctions, terminals or country buyers, or to feeders such as Plaintiffs, after which such livestock was fed by Plaintiffs in custom feed yards. Livestock is purchased from these sources or, occasionally, directly from the producer or from Plaintiffs as feeders of cattle, by commercial slaughterhouses or meat packers who slaughter the livestock before selling it as either fresh, frozen or processed meat products. Approximately 75% of the fresh, frozen or processed meat products sold by packers goes to

retailers, such as Defendants, either directly or through branch houses, wholesalers, or other distributors, and is thereafter sold for domestic consumption. The sale of meat constitutes the most important product line handled by retail food marketers, and the losses or failure of a meat operation can, and often does, account for the overall profitability of a retail store.

39. The prices which Plaintiffs and other livestock producers and feeders are able to realize on the sale of their livestock are principally determined by the prices paid for fresh meat by retailers. The prices paid by retailers, such as Defendants, for dressed meat at wholesale, ultimately filter down in the form of lower prices, which are passed on through the distribution chain until they reach the livestock producers and the feeders of livestock, and thereby set the ceiling prices which can be and are realized by Plaintiffs and other feeders of livestock and producers in the sale of their livestock.

40. During the period of time covered by this complaint, Defendants have been and now are engaged in Interstate Commerce in the conduct of the respective businesses, to-wit: the purchase, sale and distribution of frozen, fresh and processed meat products. During the period of time covered by this complaint, there has been a continuous flow of livestock and frozen, fresh and processed meat products across state lines in Interstate Commerce. Violations of the antitrust laws hereinafter recited have operated to directly and substantially affect said interstate trade and commerce, and the livestock and frozen, fresh and processed meat products, subject to the restraints set forth hereinafter have and do move directly in the channels of Interstate Commerce.

V

OFFENSES CHARGED

41. Beginning at a date unknown to Plaintiffs, and continuing up to the date of the filing of this complaint, the Defendants have been and now are engaged in an unlawful combination and conspiracy to restrain unreasonably the aforesaid interstate trade and commerce in and to arbitrarily fix the price of livestock and fresh, frozen and processed meat products, in violation of Sections 1 and 2 of the Sherman Act (15 U.S.C. 1, 2).

42. The substantial terms of the said combination and conspiracy consisted of a continuing agreement and concert of action among the Defendants:

a. to pay suppliers uniform, arbitrary, non-competitive and artificially low prices on fresh, frozen and processed meat products; and

b. to charge non-competitive and artificially high prices for fresh, frozen and processed meat products sold at retail.

43. Pursuant to and in furtherance of the aforesaid violations of the antitrust laws, each Defendant did those things which, as hereinbefore alleged, they combined and conspired to do.

44. Beginning at a date unknown to Plaintiffs, and continuing up to the date of the filing of this complaint, the Defendants have combined and conspired to monopolize, have attempted to monopolize, both unilaterally and together, with the specific intent, and have monopolized a part of interstate trade and commerce in livestock and fresh, frozen and processed meat products in violation of Sections 1 and 2 of Sherman Act (15 U.S.C. 1, 2).

45. In addition to the above, and alleging more specifically, Plaintiffs charge:

a. Beginning at a date unknown to Plaintiffs, but at least as early as 1963, and continuing up to the date of the filing of this Complaint, the Defendants and co-conspirators through meetings arranged and conducted by Defendant National Association of Food Chains and by other means have engaged and are now engaged in an unlawful combination and conspiracy in unreasonable restraint of the aforesaid interstate trade and commerce in cattle and fresh, frozen and processed beef, and have engaged and are now engaged in an unlawful combination and conspiracy to monopolize, and have monopolized and attempted to monopolize, and are now monopolizing and attempting to monopolize, both unilaterally and jointly, such trade and commerce in violation of Sections 1 and 2 of the Sherman Act (15 U.S.C. Sections 1 and 2).

b. The aforesaid combination and conspiracy to restrain trade and commerce, and the combination and conspiracy to monopolize, the monopolization, and the attempt to monopolize such trade and commerce have consisted of a continuing course of conduct, plans, agreements and concerts of action by and among Defendants and their co-conspirators, the substantial terms, purpose and intent of which have been to:

(1) Fix, stabilize and maintain at uniform, non-competitive and artificially low levels the price paid to slaughterhouses and meat packers for fresh, frozen and processed beef.

(2) Charge non-competitive and artificially high prices for fresh, frozen and processed beef sold at retail to consumers.

(3) Utilize market dominance and economic power to depress and maintain at artificially low and constant levels the farm-wholesale price margin or spread when the wholesale retail price margin or spread is and has been experiencing consistent increases an unexplained, non-cost justified, abrupt

rises such as occurred to a greater extent in 1969 and 1973 and a lesser extent over the last 20 year period.

(4) Geographically segment the market for fresh frozen and processed beef, and allocate territories to the dominant retail food chains and to thereby exercise price leadership in the purchase and sale of such beef.

(5) Eliminate price competition for fresh, frozen and processed beef by employing a system of price leadership whereby Safeway on the West Coast and A & P on the East Coast and other co-conspirators at other times and places set prices by accepting bids from packers one day in advance of all other retail food chains who thereafter follow the price established by the dominant firms.

(6) Eliminate price competition for fresh, frozen and processed beef by employing the Yellow Sheet published by Defendant National Provisioner as a device to communicate the price paid in the different areas of the United States and thereby stabilize prices throughout the United States.

(7) Utilize the National Association of Food Chains to develop and effectuate the aforesaid price fixing conspiracy.

(8) Manipulate the Yellow Sheet information gathering methods so that the Yellow Sheet reflects artificially low and inaccurate prices paid for beef carcasses and parts thereof.

(9) Hold meetings among their own agents and employed and with each other for the purpose of implementing, designing, organizing and carrying out all of the conspiracies alleged here.

(10) Boycotted packers, feed lots and producers until prices were satisfactory to them.

(11) Purchase large portions of hind quarters, leaving excesses of front quarters and then purchasing the front quarter at substantially decreased prices.

VI

FRAUDULENT CONCEALMENT

46. The Defendants and co-conspirators fraudulently concealed the existence of their conspiracy and discrimination by various means used to avoid the detection thereof, and as a result of such concealment, the Plaintiffs had no knowledge and could not, by the exercise of reasonable diligence, have obtained the knowledge of the existence of the conspiracy and discrimination.

47. By virtue of this fraudulent concealment, Plaintiffs assert the tolling of any applicable statute or period of limitations affecting Plaintiffs' rights of action herein.

48. Pursuant to and in furtherance of the aforesaid violations of the antitrust laws, each Defendant did those things which, as hereinbefore alleged, they combined and conspired to do.

49. The secret meetings and conspiracies of Defendants whereby they entered into agreements to maintain uniformity in the pricing of wholesale beef were not known to Plaintiffs until January, 1974, when such concealed and fraudulent conduct was discovered. All Defendants, including all members of the National Association of Food Chains, concealed said meetings and agreements which were in violation of Sections 1 and 2 of the Sherman Act (15 U.S.C. 1, 2).

50. Said Defendants used their membership in the National Association of Food Chains, of which they were members, as a means of meeting and doing the things charged herein in their furtherance of such violations of the antitrust laws, and in such conspiracies and combinations alleged, which meetings were secret and often such members and representatives of such Defendants undertook to conceal and disguise their identity.

51. That all horizontal combinations, to fix prices in violation of the Sherman Act, and all such concerted actions as alleged herein were of such a nature as to undertake secrecy and concealment from the public and the Government and Plaintiffs, as amounts to fraudulent concealment of such combinations and conspiracy in fixing such prices.

52. That said Defendants have used the National Provisioner, of 15 West Street, Chicago, Illinois, the publisher of the "Yellow Sheet", which is dispensed through telegraphic and electronic wires, sending messages throughout the country, giving the daily prices of meat products, as given to it by Defendants. Each and all of said Defendants have agreed to, and do, talk to said National Provisioner, and its publisher, in order that said National Provisioner could make and publish the price determinations of Defendants on a daily basis, as made by the Defendants, and each and all of them. Defendants have been able to control the prices of meat products, both in the purchase and acquisition of slaughtered animals, including the purchase price thereof as well as the sales price of meat products to the public, and such National Provisioner is an integral part of such scheme and combination in fixing and determining the prices paid by said Defendants and the price for which meat products have and are sold by said Defendants, and was and is part of the overall scheme to conceal the activities, the combinations, and the unlawful acts and the violations of such antitrust laws as are herein alleged, leading the public to believe that the said National Provisioner was something different than the mouthpiece for each and all of the Defendants, and the method and means of the Defendants in fixing and determining such prices in the purchase of meats and in the sale of meat products. That said Defendants and each of them, by virtue of such means and schemes,

have had control of the meat packers and the amounts paid to such packers, and were and are able to fix the prices Plaintiffs receive for their cattle; and the packers and the cattle feeders were at their mercy, as well as the consuming public buying meats from Defendants at their retail outlets. Said Defendants thereby had control of prices, and both sellers and buyers were at their mercy, with huge profits resulting to the Defendants in unreasonable amounts, and in many instances, huge and large losses to feeders, including Plaintiffs, running into hundreds of dollars per animal.

53. The Defendants, and each of them, did at all times referred to in Plaintiffs' Original Petition contend that they have not violated the Federal Antitrust Statutes as Plaintiffs have alleged. That such denials by the Defendants are now and have at all times been a misrepresentation of facts. Said Defendants have fraudulently concealed their antitrust violations. Said fraudulent concealments have and do toll the running of the Statutes of Limitations. The Plaintiffs did not know and did not learn and could not have, in the exercise of ordinary care and prudence, discovered such fraudulent concealment until shortly prior to the filing of this suit.

54. The Defendants have continuously denied all of the allegations of wrongdoing, as hereinafter alleged. The Plaintiffs do not intend to assert that the Defendants have no right to deny to the Court the allegations hereinafter set forth. Plaintiffs do maintain, however, that the continuous denials of the allegations plead herein are, and always have been, an integral element of the general scheme to monopolize, control and fix the prices as alleged in Plaintiffs' complaint; and further, constitute a part of the fraudulent concealment of such actions herein alleged and complained of, the basis of which plaintiffs

did not know, and in the exercise of reasonable diligence could not have known or discovered.

55. The Defendants and each of them pursued a studied course of conduct to cover up their unlawful acts and unlawful combinations and conspiracies in the fixing of prices, among other things in claiming and contending at all times that they did not have records which would show their profit margins in beef. The Defendants have made such claims even under oath, when in truth and in fact they did have such records at all times. This has been a deliberate concealment, to cover up large and great profits, which if it had been known or could have been discovered, in the exercise of reasonable diligence, would have been one circumstance of price fixing. The Defendants' false claims in this respect were acts of fraudulent concealment.

56. The Defendants have refused to appear upon request before the Domestic Marketing and Consumer Relations of the Committee on Agriculture in the House of Representatives to give information in such Congressional investigation on matters concerning pricing, prices and price fixing of meat. The Defendant have given various and sundry excuses for their failure to give information and cooperate with the investigative committees of the Government, and have fraudulently concealed the real reason, which was that if true information were divulged, it would show and point to the guilt of the Defendants in unlawfully fixing prices as alleged, and the deliberate cover up of such real reason of their failure to cooperate and give information is and has been deliberate and for the purpose of frauduently concealing their wrongdoing.

57. Representatives of the Defendants have met at various times clandestinely to discuss beef marketing and prices. Such meetings have been denied by Defendants, and said De-

fendants have concealed the same, as well as the purpose and the actions taken by them, which concealment was fraudulent and done for the purpose of covering up such violations of the antitrust laws.

58. The Defendants, through their officers, agents and employees, have at all times maintained a cloak of secrecy surrounding their actions and meetings which were unknown to Plaintiffs until recently in the year 1974, and there was no way for Plaintiffs to have known of such conduct until shortly before the filing of this suit, when officers, agents and employees of Defendants, for the first time, under oath, admitted such conduct.

59. The Defendants, as members of the National Association of Food Chains and as competitors in the beef market, have met over a long period of time, not only to discuss prices of meat, but to enter into agreements concerning the fixing of those prices, and also ways and means to cover up their wrongdoings. This was not known to Plaintiffs until recently, and only a few weeks before the filing of this suit.

60. The use made by the Defendants of the National Association of Food Chains afforded opportunity to discuss and agree upon prices and pricing policies on an industry-wide basis. The Defendants secretly used such association for such unlawful purposes. Such use of such association has been and is now denied by Defendants. Such use and activities of Defendants was not known by Plaintiffs to be a fact until shortly before the filing of this suit in the year 1974. The National Association of Food Chains was being used for the unlawful purpose of the Defendants in fixing prices, and their "cover up" of such use was a fraudulent concealment.

61. The Defendants undertook to avoid the appearance of fixing prices on a daily basis by setting up a reporting system

commonly referred to as the "Yellow Sheet", called the National Provisioner, published in Chicago, Illinois, which dispensed through telegraphic andd electronic wires, messages throughout the country to all States of the Union, giving daily prices of meat products as furnished to it by Defendants. The Defendants were at liberty to give the National Provisioner only a portion of its transactions and that portion it determined advantageous to having the desired effect in making, causing and creating the desired price structure. Defendants knew the packers, the feeders and the livestock industries were reading, following and relying upon the quotations in the "Yellow Sheet" as the basis for sales of fat live animals. The Defendants manipulated the figure in such a way as to lower or increase prices as they desired for their benefit. Defendants caused the "Yellow Sheet" to be such that it did not in all instances reflect the true information of the amounts of beef handled, and the prices paid by the Defendants, and the price for which Defendants sold the same. Plaintiffs did not know that Defendants used this method of getting together and using a third person to bring about the fixed prices of such cattle in the same manner as if they had gotten together and agreed upon the price the Defendants desired the public to know on any specific day. The Defendants have at all times denied their actions in this respect. Such actions and conduct on the part of the Defendants was a scheme to fix prices in a concealed manner. They used the publisher of the price list or sheet without the publisher knowing it was being wrongfully used as the tool of the Defendants and as their unwitting pawn to mislead the public and the sellers of meat and beef. Defendants kept this scheme secret, and Plaintiffs did not know and could not have known of the conduct of Defendants until the same became public only recently. This conduct con-

stituted fraudulent concealment of Defendants' wrongful acts.

62. The Defendants have kept secret their combined efforts and agreements in the establishment of a system of centralized buying on separate and different days. One Defendant would buy meat on one certain day of the week and another Defendant would buy on a certain other day of the same week. The Defendants would by this method not bid against each other on the same day. The meat for Defendants' supply would be purchased by its centralized order buying department for all its many stores across the country, and to further mislead the public, they would alternate from time to time the respective dates or days in the week they would buy their supply, but not in competition with each other. Defendants contended at all times that they were acting in good faith when such system was not in good faith, but for the purpose and calculated to force control of prices, and the actions of said Defendants in this respect were not known by Plaintiffs, nor could they have been known in the exercise of ordinary care. The Defendants kept this plan and course of dealing and conduct secret. The plan and course of conduct was not known until about the time of the filing of this suit.

63. The Defendants have schemed together to violate the antitrust laws in the fixing of prices as herein alleged and to conceal their violations by their officers, agents and representatives meeting together and using code names, certain colored uniforms and disguises of individuals and other such cloak and dagger type devices for the purpose of hiding their intent, designs and conspiracies from the Plaintiffs and the public, and they have been able to do so until very recently, and only shortly prior to the filing of this suit, when certain officials confessed to such wrongdoing.

64. In the secret and concealed meetings in which the Defendants participated, the participants were identified, not by name or by company, but by color-coded badges, in order that anonymity could be assured by the National Association of Food Chains and its members, in order that secrecy of discussions could be maintained. This conduct, as such other conduct alleged herein and such denials and misrepresentations of and by the Defendants, was with the fraudulent intent and purpose to conceal the crimes and unlawful acts and antitrust violations complained of herein.

65. The meeting topics, agenda and minutes of the National Association of Food Chains used by the Defendants as heretofore alleged were with the sanction and approval of the Defendants, labeled confidential. The public was excluded from the meetings. The agreements and decisions were recognized, followed and adhered to by the members. In order to further conceal the wrongful agreements, combinations and price fixing decisions, the minutes would be monitored and deletions would be made and so changed as to disguise the real purpose and intent of the same, and to fraudulently conceal the wrongs and unlawful acts.

66. One official of a member of the National Association of Food Chains who was in charge of meat marketing denied even meeting representatives of other retail chain stores under any circumstances, which denial was only withdrawn by him when confronted by photographic evidence to the contrary.

67. The Defendants failed to report all sales and all prices of all sales to the National Provisioner and to Government officials. Plaintiffs did not know this until recently. Although requested by the Government to give such reports, said Defendants failed to so do. Defendants followed this course of

conduct to keep secret and to fraudulently conceal their wrongs as charged.

68. Defendant JEWEL COMPANIES, INC. was a member of the National Association of Food Chains and one of the conspirators in fixing of prices. The Defendants and members of said Association acting together covered up their earnings and profits in meats, and at all times denied the ability of the various stores of the members of said association to determine their profits in the handling of meats. This course of conduct was for the studied and deliberate purpose of fraudulently concealing their profits in that enormous and great profits would have indicated to the public that prices were being manipulated and fixed if the public had known of the same. Such denials by the Defendants of any records which would show such profits were for the fraudulent purpose of concealing their violations of the antitrust laws. It was only recently before the filing of this suit that one of the employees of Defendant JEWEL COMPANIES, INC. gave information under oath that such denials by the Defendant companies and by the member companies of said association were false and untrue, and that the Defendants and their respective stores did have records which showed their profit margins in the purchase and sale of beef.

69. The Defendants have at all times fraudulently and wrongfully denied all allegations of price fixing, publicly and to the Department of Justice, the Government officials, and to the public generally, up to the date of the filing of this suit, and are still making such claim and assertions and are so doing the same for the purpose of expecting the public and others to rely upon their statements and in order to hide and cover up their wrongdoing. Such denials and mis-statements to such Governmental departments, is fraudulent concealment of the

most gross nature, and is in fact itself unlawful and a crime under the law.

70. The Defendants have denied not only to the Government and Government officials and Congressional investigative committees that they could not determine their profits in buying and selling meat, but they have also made such representation to the packers, to cattlemen and to the public generally, and such denials and such statements were untrue and were done for the purpose of covering up and concealing unreasonably large profits which the Defendants have made from the purchase and sale and the handling of meats. That such course of conduct on the part of the Defendants in each and all of such denials and mis-statements of facts in each and every instance constitutes fraudulent concealment of the said acts of the Defendants in having fixed the prices paid for meat in violations of the law as alleged.

71. The Defendants have illegally disrupted the law of supply and demand in the purchase and sale of meats as alleged in the Complaint, and the Defendants have continued a studied course of conduct to fraudulently conceal their actions in disrupting the law of supply and demand, and have used all manner of means and methods to mislead the public, including Plaintiffs, including the giving of misinformation as herein alleged, while at the same time asserting innocence, and which course of conduct in the use of the news media, as well as in speeches and writing has been for the purpose of fraudulently concealing their wrong doings.

72. The Defendants have publicly stated to Government officials and Government and Congressional committees, including the National Commission on Food Marketing, that the low cost of meat to the packers and the increased retail price of beef to the consumer was because of such things as adver-

tising, trade stamps, parking lots, bigger stores, and did not result in increased profits to the Defendants. In truth and in fact, such statements and representations were untrue and were mis-statements of facts, and such course of conduct has been pursued for the purpose of covering up their price fixing violations, and amounts to and constitutes fraudulent concealment of the violations alleged.

73. The Defendants, through their membership in the National Association of Food Chains, kept minutes of its meetings and it has only recently been discovered at or about the time of the filing of this suit that one Mr. Christianson, a Vice-President of said association, revealed under oath that after the minutes were taken and written that he, at the instructions of the officers of the Defendants and other members of said association, deleted from said minutes all references to prices and price discussions and price agreements and price stabilizations as discussed at such meetings of such association. That such acts of said Vice-President, Christianson, were done for the purpose of fraudulently concealing such wrongful and illegal decisions and determinations of said association at such meetings, all of which were in violation of antitrust laws. That said acts on the part of said Christianson were in furtherance of the illegal conspiracy herein complained of, and were all part of the conspiracy, not only to commit the illegal acts complained of in violation of the antitrust laws, but also the added and additional conspiracy to fraudulently conceal such illegal acts from the pubic, incuding these Plaintiffs.

74. The Defendants have at all times argued that the National Association of Food Chains was a legitimate trade association, when in truth and in fact, the said association was used by said Defendants as a vehicle for the Defendants' price

fixing conspiracy, and the Defendants used the same as well as the "Yellow Sheet" to gain and arrive at substantial uniformity in prices paid for meat. The retail prices for which the meat sold also resulted from the activities of such association. The Defendants and each of them covered up and concealed their use of the association and said publication for their illegal purposes, all in a fraudulent way and manner, in order that their wrongdoings would not be known and in an attempt to keep the same from ever being known. Only recently the owner of one of the members of National Association of Food Chains admitted for the first time that meat profit margins were discussed at such meetings and that topics of discussion at such meetings and committee meetings of such organization included specifics as to prices. Further, said members, including said Defendants, caused said organization to request and determine meat prices for them. That such actions were so secret and kept so secret that the public did not know and could not find out prior to the recent confession and testimony under oath of such person. Such action was fraudulent concealment of Defendants' wrongs.

75. The Plaintiffs have suffered damages as the result of the combination and conspiracy among the Defendants to pay uniform, arbitrary, non-competitive and artificially low prices to suppliers for meat products, as alleged in the Plaintiffs' Complaint. That such actions of said Defendants and each of them have been concealed by the Defendants in a well planned manner, and said Defendants have acted together in such concealment. Said Defendants have failed to divulge, when properly called upon by those in authority, to tell the truth, and have concealed the existence of the said combination and conspiracy through fraudulent means.

76. The Defendants and each of them used numerous other means of covering up and concealing their said wrongful acts, and have at all times misrepresented to the public the fact that they were so fraudulently concealing their said violations. That said fraudulent concealment of said violations on the part of the Defendants and the members of the said National Association of Food Chains was a part of the overall scheme to monopolize, control and fix the prices as alleged in Plaintiffs' Complaint, and such course of conduct in committing such violations and in covering up and concealing the same was jointly pursued by all members of said association. An ordinary, reasonable, prudent person, cattle feeder, or businessman could not have known and could not have discovered that the mis-statements and misrepresentation of the Defendants and members of said association were untrue, nor that the Defendants were monopolizing, conspiring to fix beef and meat prices and actually fixing same, in violation of the antitrust laws.

VII

INJURY TO PLAINTIFFS

77. As a direct and proximate result of the unlawful conduct hereinbefore alleged, Plaintiffs have:

a. sustained losses in value of their respective businesses;

b. sustained losses in profits which they otherwise would have made; and

c. sold their livestock for less than they would have in an open and competitive market.

78. Plaintiffs have tentatively ascertained the dollar amount of said damages to be in excess of $20,000,000.00, and when said damages have been more accurately determined, Plaintiffs will ask leave of Court to amend complaint by inserting said amounts herein.

WHEREFORE, Plaintiffs pray:

1. That the Court adjudge and decree that the Defendants have combined and conspired in restraint of trade and commerce, hereinabove described; and combined and conspired to monopolize, attempted to monopolize, and have monopolized the described trade and commerce in violation of Sections 1 and 2 of the Sherman Act;

2. That the Plaintiffs recover their damages, which, when ascertained, must be trebled as required by Section 4 of the Clayton Act;

3. That Defendants be enjoined from continuing their unlawful conduct;

4. That Plaintiffs be awarded reasonable legal fees, as provided by Section 4 of the Clayton Act;

5. That Plaintiffs recover the costs of litigation as provided by Section 4 of the Clayton Act; and

6. That Plaintiffs have such other and further relief as the Court may deem just and proper.

Respectfully submitted,
A. L. BLACK
Plaintiff
LILA M. BUSKE, Surviving Wife of G. B. BUSKE, As Independent Executrix and and Trustee Under The Last Will and Testament of G. B. BUSKE, Deceased, Dated December 12, 1973, and of The Estate of G. B. BUSKE, Deceased, Plaintiff

PIONEER CATTLE ORDER
BUYERS, INC.,
A Texas Corporation
Plaintiff
HEREFORD FEED YARDS,
INC., A Texas Corporation
Plaintiff
SOLANA CORPORATION,
A Texas Corporation
Plaintiff
PROCHEMCO CATTLE CO.,
INC., A Texas Corporation
Plaintiff
EUREKA CATTLE CO., INC.,
A Texas Corporation,
Plaintiff
By WITHERSPOON, AIKIN,
LANGLEY, WOODS & GULLEY
Attorneys at Law
P.O. Box 1818
Hereford, Texas 79045
(806) 364-1100
and
LAW OFFICES OF JOSEPH L.
ALIOTO
111 Sutter Street
San Francisco, CA 94104
JAMES W. WITHERSPOON
Attorneys for Plaintiffs

REQUEST FOR JURY TRIAL

Plaintiffs request jury trial in Amarillo, Texas.

JAMES W. WITHERSPOON

CERTIFICATE OF SERVICE

The undersigned, one of the attorneys of record for Plaintiffs, hereby certifies that a true and correct copy of the foregoing Amended Complaint in Civil Action 2-75-186 (First Amendment) has been served upon the following:

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Washington, D.C. 20006

Attorneys for National Association of Food Chains the above listed being attorneys of record for Defendants; a copy of the foregoing Amended Complaint has also been served upon the following attorneys of record for Plaintiffs:

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Attorney for Burke Petersen, et al.

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Mr. Jerrold N. Offstein
Attorney at Law
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San Francisco, California 94104
Attorney for R. Dirk Agee

by placing the same in the United States Mail, postage prepaid on this the 16th day of March, 1976.

JAMES W. WITHERSPOON

APPENDIX B
STATUTE AND RULES
APPENDIX
SHERMAN ACT

§1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court. (15 U.S.C. §1.)

§2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court. (15 U.S.C. §2.)

CLAYTON ACT

§4. Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and

the cost of suit, including a reasonable attorney's fee. (15 U.S.C. §15.)

§16. Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections 13, 14, 18, and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: Provided, That nothing herein contained shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit in equity for injunctive relief against any common carrier subject to the provisions of the Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, in respect of any matter subject to the regulations, supervision, or other jurisdiction of the Interstate Commerce Commission. (15 U.S.C. §26.)

FEDERAL RULES OF CIVIL PROCEDURE

Rule 8.

(a) A pleading which sets forth a claim for relief, whether an original claim, counterclaim, crossclaim, or third-party claim, shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it, (2) a short and plain statement of the claim showing that the pleader is entitled to

relief, and (3) a demand for judgment for the relief to which he deems himself entitled. Relief in the alternative or of several different types may be demanded.

(e)(1) Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleadings or motions are required.

(e)(2) A party may set forth two or more statements of a claim or defense alternately or hypothetically, either in one count or defense or in separate counts or defenses. When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. A party may also state as many separate claims or defenses as he has regardless of consistency and whether based on legal, equitable, or maritime grounds. All statements shall be made subject to the obligations set forth in Rule 11.

(f) All pleadings shall be so construed as to do substantial justice.

Rule 12.

(b) Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counter-claim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join a party under Rule 19. A motion making any

of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

(c) After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

Rule 15.

(a) A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 20 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires.

A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

(c) Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against him, the party to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.

The delivery or mailing of process to the United States Attorney, or his designee, or the Attorney General of the United States, or an agency or officer who would have been a proper defendant if named, satisfies the requirement of clauses (1) and (2) hereof with respect to the United States or any agency or officer thereof to be brought into the action as a defendant.

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